Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

APA TRANSPORTATION CORPORATION,
Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 560, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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December 23, 2008

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QUESTIONS PRESENTED

1. Whether the Third Circuit's erroneous construction of the "faltering company" exception under the Workers Adjustment Retraining Notification Act, 29 U.S.C. §2102(b)(1), renders the exception illusory, thereby precluding employers from obtaining essential financing, and requiring premature business closings that damage the economy and precipitate job loss?

2. Whether the Third Circuit's granting of summary judgment without considering evidence of "actively seeking ... business" expunges statutory language and fundamentally misconstrues the breadth of the statutory exception?

3. Whether the Third Circuit's summary judgment determination usurps the fact finder's function, and forecloses Petitioner's right to present material facts in its defense?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellee and Petitioner: APA Transport Corp.

Plaintiffs-Appellants and Respondents: Teamsters Local Union No. 560, Teamsters Local Union No. 470, Brian Campbell, John Cronin, Jr., Andrew Imperatore and Richard Yurchisin.

RULE 29.6 CORPORATE DISCLOSURE

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, there is no parent or publicly held company owning 10% or more the stock of the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

APA Transport Corp. ("APA") petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Third Circuit, dated August 29, 2008, is officially reported at 541 F.3d 233, and is reproduced at 1a-37a.

The Memorandum Opinion and Order of the U.S. District Court for the District of New Jersey, dated December 7, 2006, is unofficially reported at 2006 WL 3534029 and 2006 U.S. Dist. LEXIS 88437 and is reproduced at 47a-90a.

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Third Circuit was entered on August 29, 2008. A Petition for Rehearing was timely submitted on September 19, 2008, and denied on October 6, 2008. This petition is timely under 28 U.S.C. §3101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the date of the denial of the Petition for Rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Federal jurisdiction was invoked in the original action to the District Court under 29 U.S.C. §§2101-2109, 28 U.S.C. §1331, 28 U.S.C. §11332 and 29 U.S.C. §1001 *et seq.*

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 29 U.S.C. §2102(b)(1) of the Workers Adjustment Retraining Notification Act ("WARN"), 29 U.S.C. §§2102-2109, and are reproduced at 93a-95a.

STATEMENT OF THE CASE

This case arises from the shut-down of APA, and the permanent lay-off of its workforce. Plaintiffs are unions representing their employee members, and individuals representing a class of non-union employees, all of whom are alleged to be aggrieved employees under WARN.

Plaintiffs allege a violation of the 60-day WARN notice period. 3a. APA asserts the affirmative defense of a *faltering company*, which entitled APA to provide reduced notice of closure, based on its demonstrated search for additional financing and additional business. 4a.

APA was a regional trucking business that had operated since 1947. In 1996, APA entered into a Loan and Security Agreement with Transamerica Business Capital Corporation ("Transamerica"). The loan provided a revolving credit arrangement with a $40 million limit, secured by the real property, equipment and accounts receivable of APA. The agreement had an expiration date of February 28, 2002. APA had previously defaulted on loan covenants in 1999 and 2000, and had executed agreements, whereby the defaults were waived and/or the loan agreement was amended, so as to maintain a financing arrangement.

On October 24, 2001, pursuant to APA's request, Transamerica met with APA to discuss the additional financing of its operations. 6a. On November 8, 2001, during the pendency of the financing request, Transamerica notified APA of a default in the loan agreement. The parties were able to work out the issues, and on December 10, 2001, Transamerica and APA agreed to a Fifth Waiver and Amendment of the Loan Agreement to cure the default.

Discussions continued, and on January 2, 2002, after curing the default, APA offered mortgages on two properties as collateral for an additional five to six million dollars of capital above the $40,000,000 limit. On February 13, 2002, Transamerica notified APA by letter that it would not provide additional financing, and that the loan agreement would therefore terminate on February 28, 2002.

The day after Transamerica denied additional financing, APA sent a WARN notice, expressly relying on the *faltering company* exception, to Teamster Local Unions 560 and 470 and to its non-union employees. APA ceased operations on February 20, 2002.

On December 7, 2006, the District Court granted summary judgment in favor of APA, on four issues, specifically that: (1) APA had met each criterion of the *faltering company* exception, including *actively seeking capital* at the time a WARN notice would have been required (December 20, 2001), (2) union benefit funds are not *aggrieved employees* within the meaning of WARN, (3) APA was the only *employer* of the affected employees, and (4) APA's notices were sufficiently specific to meet WARN requirements.

Plaintiffs appealed to the Third Circuit. On August 28, 2008, the Third Circuit affirmed the District Court entry of summary judgment on all counts, except the *faltering company* exception. The Third Circuit held that, as a matter of law: (1) APA failed to demonstrate that it actively sought capital on December 20, 2001, and (2) APA's meeting to discuss financing with its chief lender, Transamerica, on October 24, 2001 was insufficient to meet the *actively seeking* standard.

The Third Circuit not only reversed the District Court's grant of summary judgment, but instructed the District Court to enter summary judgment in favor of the Plaintiffs.

APA petitions this Court for review of the Third Circuit's decision that APA did not satisfy the *faltering company* exception to the 60-day WARN notification requirement.

REASONS TO GRANT THE PETITION

This is a case of first impression, interpreting the *faltering company* exception under WARN, and in particular the construction of the *actively seeking capital* requirement within that exception. 29 U.S.C. §2102(b)(1). This case is of national significance in that the Third Circuit has so narrowly construed this exception as to render it a nullity. Accordingly, employers, which would otherwise be able to raise additional capital or obtain additional financing, will be compelled to provide a premature WARN notice, which will preclude refinancing and result in premature closings. This result is destructive of the rights of labor and management, and is contrary to the manifest intent of WARN to provide an opportunity for

refinancing, and thereby augment the economic security of workers.

Although there is no current conflict in the circuits (given that this is a case of first impression), the antagonistic statutory constructions of the Third Circuit and the District Court presage an inevitable circuit conflict. Given the significant impact of the *faltering company* exception in this faltering economy, it is imperative that this Court establish a uniform standard to define employer obligations.[1] Employer refinancing occurs under stressful conditions, in an abbreviated time frame, within a framework of extraordinary confidentiality constraints. This Court's guidance is essential for the statutory exception to be rationally applied.

The Third Circuit sets forth two reasons for its decision. The first rationale is that WARN, on its face, requires a discrete written request for financing exactly 60 days prior to the date the employer actually closes. 35a-36a.

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[1] Following the Third Circuit's decision in this case, there have been numerous lawsuits filed, alleging violations of WARN notice requirement. *See* Curry et al. v. MRS Management Co., Inc. et al., No. 08-cv-02194 (N.D. Tex. filed Dec. 10, 2008); Pearson v. Land South Adventures, LLC, No. 08-cv-02395 (M.D. Fla. filed Dec. 2, 2008); Bergman v. Thelen LLP, No. 08-cv-5322 (N.D. Cal. filed Nov. 24, 2008); Guippone v. BH S & B Holdings, LLC, No. 08-01747 (Bankr. S.D.N.Y. filed Nov. 20, 2008); Berenshteyn v. Lehman Brothers Holdings, Inc., 08-01654 (Bankr. S.D.N.Y. filed Nov. 4, 2008); McCoy v. Value City Holdings, Inc., No. 08-01648 (Bankr. S.D.N.Y. filed Oct. 29, 2008); Austen v. Archway Cookies, LLC, No. 08-12323 (Bankr. D. Del. filed Oct. 6, 2008); Kratzel v. Bill Heard Enterprises, Inc., No. 08-80154 (Bankr. N.D. Ala. filed Oct. 3, 2008).

The Third Circuit errs in requiring proof of formal employer action to obtain financing exactly sixty days prior to the date of shutdown – a manifest impossibility unless the employer was prescient, had pre-determined the date of shutdown, or there were a fortuitous correlation of dates.

As discussed by the District Court, the *faltering company* exception cannot be rationally construed to require a party to predict the future. Nevertheless, the Third Circuit concludes that the plain language of the statute requires that employers have such prophetic abilities, and that this incongruity must be taken up with the Congress, not the Court. 34a.

By viewing the refinancing process as a series of discrete and disconnected acts, rather than a continuum of conduct towards the goal of obtaining refinancing, the Third Circuit disregards the reality of the refinancing process, and defeats the purpose of the exception. The Third Circuit's parsing of the statute is premised on a peculiar view of *actively seeking*. If, for example, APA had made a written request for financing on December 9 – according to the Third Circuit -- that request would have no continuing validity on December 10, because the specific act did not occur that day. Contrary to the Third Circuit's construction, logic and experience mandate that what is *actively sought* on day 1, continues to be *actively sought* on day 2, unless nullified by an intervening event.

The Third Circuit's decision is premised on a virtual impossibility: namely, that APA had to take a formal action on December 20. The Third Circuit ignores the earlier December 10th Waiver and

Amendment to the Loan Agreement, finds the January 2 tender of properties to be thirteen days late, and thereby fails to address the continuum of specific steps which precede and follow the operative December 20 date.

The Court's second rationale is that even if formal action were not required exactly sixty days before shutdown (December 20), the October 24 meeting between APA and Transamerica was insufficient, as a matter of law, to meet the standard of *actively seeking capital*. The Third Circuit's error is threefold: (1) the October 24 meeting was sufficient, (2) the October 24 meeting must be viewed contextually, in connection with the amended loan agreement, executed between Transamerica and APA on December 10, and the tender of properties by APA on January 2, and (3) if these actions were deemed insufficient on the skeletal record of the summary judgment proceeding, a hearing should have been ordered.

The employer's conduct must be reviewed in the context of its financial relationships, to determine if it was *actively seeking capital* at the time the WARN notice would have otherwise been required. APA executives had ongoing discussions with APA's lender, Transamerica, over a period of months (which spanned the WARN notification date), to secure additional financing, to cure a prior default, and to offer additional property to secure the requisite financing. Moreover, APA had a long course of dealing with Transamerica, as Transamerica had provided financing to APA for many years, had a security interest in APA's property, equipment and receivables, and was the most viable source of additional financing,

given the history and Transamerica's security interests.

The Third Circuit views the specifics of the APA/Transamerica relationship, and their course of dealing, as immaterial. The Court thereby deprives APA of a hearing, to develop a full factual record of the parties' financial transactions, including the continuum of APA's actions during the critical period following the September 11 World Trade Center bombing through January 2, 2002. These facts are material to obtaining a full understanding of the extent of APA's efforts to obtain additional financing from Transamerica, as well as through other sources.

The District Court found that APA's showing, as a matter of law, fell within the *faltering company* exception. The Third Circuit not only vacated that decision, but found APA's factual showing insufficient as a matter of law, without consideration of the "actively seeking...business" component of the statutory exception, and without providing APA with the opportunity to develop the factual record.

This Court should grant *certiorari* to construe the *faltering company* exception, consistent with WARN's intent, so that employers will not be precluded from reliance on this exemption at a time of unprecedented economic turmoil.

I. The Third Circuit's Determination that APA was not Actively Seeking Capital on the Operative Date Renders the Faltering Company Exception a Nullity.

The WARN Act requires that an employer not effect a plant closing or shutdown until 60 days after notice is given to affected employees. There is, however, an exception to that restriction. An employer may order the shutdown or closing before the conclusion of the 60-day period if:

> *[A]s of the time that notice would have been required the employer was actively seeking capital or business* which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. §2102(b)(1). (Emphasis added.) The exception is to be narrowly construed, and is an affirmative defense. The only aspect of the exception that is at issue, is the *actively seeking capital* requirement, and specifically, the temporal requirement that the capital must be sought *as of the time that notice would have been required.*[2] The Department of Labor WARN regulations provide at 20 C.F.R. § 639.9(a)(1) that:

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[2] As set forth below, the Third Circuit's excising of the "actively seeking...business" component to the *faltering company* exception is also at issue, in light of the Court's failure to order a trial to develop a factual accord.

> An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify *specific actions* taken to obtain capital or business.

(Emphasis added.) The Third Circuit erroneously conflates the *specific actions* referenced at the end of the regulation with the statutory *actively seeking capital* requirement (as of the date that notice would have been due). 34a. The statute, however, does not use the term *specific actions,* and the regulation does not require that the *specific actions* occur on the date notice was otherwise due. *Specific actions* are necessary to demonstrate *active seeking,* but need not themselves occur on the critical date. Rather, *specific actions* which occurred before and/or after the critical date (December 20), may, as here, demonstrate that *active seeking* occurred on that date.

The District Court found no precedent for the "precise requirement" that *specific actions* must occur exactly 60 days before the eventual shutdown. The District Court cautioned that even if such precedent existed, it should be approached with "great trepidation." 78a. The District Court reasoned that:

> Simply put, to require such precision from an employer would effectively eliminate any

> practical application of the "faltering business" exception as it would require said employer to read the minds of the financial institutions or institutions from which it seeks financing.

78a. The District Court cited APA's situation as a textbook example of why such a construction was untenable. 78a-79a.

As referenced by the District Court, APA's "financial straits ... significantly worsened after the tragic events of September 11, 2001, and APA "met with Transamerica on October 24, 2001 to request additional funds." Moreover, based on the unrebutted testimony of Transamerica representative, Christopher Norrito, the Court found that, at the time of the October 24th meeting, Transamerica had:

> [R]eceived a communication from ... APA Transport in which they indicated that they're seeking additional monies from Transamerica.

79a. Moreover, according to Mr. Norrito, at that time, Transamerica wanted to keep APA "afloat," not "pull the plug" and was considering "pour[ing] more money into APA." 80a.

The District Court also found that "there was no basis to anticipate a closure date of February 20, 2002," and "thereby not reasonable to insist that Defendant APA Transport take specific, actual and literal steps on December 20, 2001 when they had taken said steps on October 24, 2001." 82a.

Moreover, APA worked through the balance of 2001 to cure prior defaults on the existing loan agreement

with Transamerica, which was a prerequisite to obtaining additional financing. On December 10, 2001, APA and Transamerica executed a Waiver and Fifth Amendment to the Loan Agreement, thereby avoiding default, and reaffirming that the underlying loan would remain in place. Negotiating this new agreement was a condition precedent to APA obtaining additional financing, and it occurred ten days before the operative date of December 20. This loan agreement was followed by the tender of mortgages on two additional properties on January 2, 2002 to secure additional financing.

The District Court noted that APA took additional specific steps after October 24, and did not view as determinative the fact that these actions, which surrounded December 20, did not occur exactly on December 20. The District Court concluded that for APA to provide notice of termination to employees prior to receiving a decision on the loan "would not only have been premature, but also, would have diminished APA Transport's chances of obtaining a loan at that time." 82a.

By contrast, the Third Circuit: (1) found the meeting between APA and Transamerica to discuss additional financing on October 24 (58 days before the peremptory date of December 20), insufficient as a matter of law, (2) ignored the loan agreement executed by APA and Transamerica on December 10 (10 days before the peremptory date), and (3) found that the January 2 tender of two properties (13 days after the peremptory date) occurred too late.

The Third Circuit determined that the October 24, 2001, meeting did not constitute a "formal request for

financing." 28a. In so doing, the Court nullified the testimony of Mr. Norrito, concerning active consideration given to additional financing on October 24. The Court ignored Mr. Norrito's testimony that at the time of the October 24 meeting to discuss financing, Transamerica had received a communication from APA seeking additional financing. 35a. Based on this unrebutted testimony, APA is entitled to summary judgment.[3]

The Court creates a "formality requirement" that is not to be found in the statute or regulation. The Court places undue weight on the manner in which the question of additional financing arose, as opposed to whether the financing was sought. The Court thereby establishes a dubious distinction in which critical refinancing, that the employer desires, and which would save the employer, is found to have been *actively considered*, but not *actively sought*.

The Court also ignores the course of dealing between the parties. The Court erroneously relies on the absence of an APA application for refinancing, when such application was not required by Transamerica of APA in light of their relationship. 36a. The Court's imposition of its own normative

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[3] The Third Circuit takes exception to the District Court's reliance on Mr. Norrito's testimony as conclusive in the context of summary judgment, even though the testimony was not disputed with regard to the key point at issue. 35a, 79a-82a. Moreover, having found Mr. Norrito's testimony not dispositive, the Third Circuit fails to consider the import of the testimony, despite its manifest significance in terms of APA's reliance on the October 24 interchange, in support of its contention that it was *actively seeking capital* as of that date.

practices in connection with the parties' negotiations is not appropriate. The error is magnified by the Court's decision that summary judgment should be granted for Plaintiffs, without the benefit of additional fact-finding concerning APA's multi-year history of obtaining, renewing and changing financing arrangements with Transamerica.

Moreover, rather than considering the relationship between the events of October 24, December 10 and January 2 to inform its view of whether *active seeking* occurred on December 20, the Court ignores the common thread, and views each event in isolation. Thus, for the Court, the significance of the January 2 tender of property is only that it did not occur thirteen days earlier. Nor does the Court acknowledge the manifest connection between the loan agreement of December 10, which cured the prior default, and APA's request for additional financing. Rather, the Court concludes that "there was no affirmative attempt by APA Transport after that [October 24, 2001] meeting to actually secure that financing." 25a. This conclusion is manifest error.

The Third Circuit relies on the Conference Report issued when Congress passed the WARN Act, and specifically that: "an employer must prove the *specific steps* it had taken, at or *shortly before* the time notice would have been required." 134 CONG. REC. S8686-01. 29a. (Emphasis added.) This construction is directly contrary to the Third Circuit's conclusion that

the *specific action* must occur on the operative date. 34a.[4]

Contrary to the Third Circuit's conclusion, APA did take *specific steps:* the request for financing that Norrito attested to, the October 24 meeting to discuss the financing, the December 10 Loan Agreement to cure the default (ten days before the operative date). Indeed, the term *step* is telling, in that it makes clear that the act does not encompass the entire undertaking. Rather, a step is one movement forward in a progression of movements along a common path. It is, according to Webster's Third New International Dictionary 22 (1993), "a stage in a process," ... "an action, proceeding, or measure often occurring as part of a series."

The Third Circuit mischaracterizes APA's conduct as "waiting for Transamerica to offer additional financing." 28a-29a. That is due to the Court's viewing of each *step* in the refinancing process without regard to the *staircase* by which the *steps* are defined. In so doing, the Court mandates that "actively" seeking financing requires some specific action beyond that contemplated by the statute, or by the parties engaged in the transaction.

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[4] The Third Circuit's reliance on the "unforeseeable business circumstances" exception – as demonstrating that Congress was not concerned with foreseeability in connection with the *faltering company* exception – is inapposite, as the conditions envisioned by the two exceptions are unrelated. Moreover, in each case, notice is required once the closing is foreseeable. In the former case, notice is required as soon as practicable after the unforeseen event occurs, in the latter case, after the financing is rejected.

It is well settled that "[t]he role of the courts in interpreting a statute is to give effect to Congress's intent." Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001). *See also* M.A. ex rel E.S. v. State –Operated Sch. Dist. Of Newark, 344 F.3d 335, 348 (3d Cir. 2003) (holding in matters of statutory interpretation, it would be inappropriate to "squint myopically" at a phrase in isolation rather than in context of the "text and structure" as a whole). Statutes must be interpreted "to receive a sensible construction, limiting application so as not to lead to injustice and oppression." Evcco Leasing Corp. v. Ace Trucking, 828 F.2d 188, 195 (3d Cir. 1987). The overall guiding principle should be that "statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible." American Tobacco Co. v. Patterson, 456 U.S. 63, 71, 102 S. Ct. 1534, 1538 (1982). A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results. In re: Kaiser Aluminum Corporation, 456 F.3d 328, 338 (3d Cir. 2006), *citing* Demarest v. Manspeaker, 498 U.S. 184, 191, 111 S. Ct. 599 (1991).

The Third Circuit's formalistic reading is based on untenable distinctions, which lead to an irrational result that nullifies Congressional intent. Congress enacted an exception to serve as an exception, and not to be a nullity.

II. The Third Circuit Failed to Consider Evidence of Actively Seeking Business, as Opposed to Capital, thereby Improperly Rendering that Portion of the Statutory Exception a Nullity.

The District Court granted summary judgment in favor of APA based solely on its specific actions to obtain additional financing through Transamerica. Therefore, it had no need to decide whether APA had been actively seeking business. The Third Circuit, in vacating the District Court's decision, and awarding summary judgment in favor of Plaintiffs, did not look beyond the scope of the District Court's determination. Accordingly, it failed to consider evidence in connection with the seeking of additional business, and limited its decision to refinancing through Transamerica.

In so doing, the Third Circuit ignored the express language of WARN, which references actively seeking "business" as an alternative to actively seeking capital. 29 U.S.C. §2101(b)(1). This distinction is also set forth in the enabling regulations, which provide that the *faltering company* exception applies to employers "seeking additional money, credit or business through any commercially reasonable method." 20 C.F.R. § 639.0(a)(1).

There is record evidence of APA's attempts to develop additional business, separate and apart from requesting refinancing through Transamerica. 79a. However, the complete record of these additional efforts was never developed because it was extraneous to the District Court's decision. The issuance of a summary judgment by the Third Circuit, without development of the factual record in this regard, is

manifest error, and has the effect of contracting the *faltering company* exception to exclude the "additional ... business" language. The exception is not, however, limited to financing, but to a broader range of business initiatives that could avoid or postpone the closing.

This is a matter of first impression, as no Circuit Court has considered the scope of the seeking *business* component of the *faltering company* exception. The Third Circuit erred in excising this component of the exception from the statute, and restricting the judicial inquiry to refinancing.

III. The Third Circuit Improperly Granted Summary Judgment in Favor of the Plaintiffs Despite Material Facts that Were in Dispute.

It is well settled that the standard of review of a District Court's decision granting summary judgment is plenary. NBT Bank Nat'l Ass'n v. First Nat'l Cmty. Bank, 393 F.3d 404, 409 (3d Cir. 2004). It is also well established that the reviewing Court must apply the same standard for granting summary judgment employed by the District Court and view the facts in the light most favorable to the non-moving party. Moore v. City of Philadelphia, 461 F.3d 331, 340 (3d Cir. 2006). Summary Judgment is only appropriate where "drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Lexington Ins. Co. v. W. Pa. Hosp., 423 F.3d 318, 322 n. 2 (3d Cir. 2005). Therefore, in order to grant summary judgment for the Plaintiffs in this matter, the Third Circuit must view all of the evidence in a light most favorable to APA,

and must then conclude that there are no genuine issues as to any material fact.

Summary judgment may be appropriate if the pleadings and discovery show there is no genuine issue of material fact as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for nonmoving party. *Id.* All ambiguities and inferences should be drawn in favor of the party opposing the motion for summary judgment. Matsushita Electronic Industries Co. v. Zenith Radio Corp, 475 U.S. 574, 587-88 (1986); Harris v. Provident Life & Accident, 310 F.3d 73, 78 (2d Cir. 2002).

The moving party bears the burden of identifying matters that it believes demonstrate the absence of a genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is proper only if, when viewing the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact. Covington v. City of New York, 171 F.3d 117, 121 (2d Cir. 1999). Thus, for the Third Circuit to reverse the District Court and grant summary judgment in favor of the Plaintiffs, there cannot be a material issue of fact in dispute.

As set forth above, the District Court correctly granted summary judgment in APA's favor based on the *faltering company* exception, and the Third Circuit applied the wrong legal standard in vacating that decision. Moreover, even applying, *arguendo*, the Third

Circuit's standard, there are disputed material facts, and APA is entitled to a hearing.

First, there is a factual dispute over what documentation was required to extend the underlying loan agreement. Specifically, there is a dispute over whether a written request for extension was required. The Third Circuit notes that a formal written request was required by the loan document. 36a. The record, however, contains testimony from Transamerica that it was considering an extension without the formal request. 78a-82a.

Second, there is a factual dispute over whether a formal written request was required to obtain additional financing. The Third Circuit found that no formal request was made, but Transamerica representatives testified that the only written "credit memo" that was required was an internal document and that at the end of 2002, "all of [its] options were open." 81a. Consideration was being given to additional financing without a written request.

Third, the record is not developed in connection with the prior course of dealing between APA and Transamerica, which is material to understanding the significance of the parties' actions with respect to the financing negotiations subsequent to September 11, 2001. The parties had ongoing financing arrangements, which had, over the course of years, been modified to take into account operating conditions and other events. 82a. These events shed light on Transamerica's requirements and expectations in connection with APA's refinancing request that is central to this litigation.

Fourth, the record is not developed concerning the conduct of the parties (in connection to refinancing), which occurred post September 11, 2001, and particularly between October 24 and December 20. For example, the record references APA putting together financial statements to cure its default in connection with the December 10 loan agreement, but there are no specifics as to whether and what documents were exchanged between the parties in connection with the agreement. 7a.

Fifth, the record contains evidence of APA's attempts to obtain capital through the potential sale of terminals to another trucking company that would have generated additional income, and references to the efforts of APA to obtain additional new business in light of the failure of certain competitors. 7a-8a. The District Court did not address these factual issues in its decision because it found that the search for commercial financing through Transamerica was adequate proof of *actively seeking capital.*

As set forth above, had the District Court determined that APA's actions with Transamerica did not constitute an active search for financing, it would have had to consider the search for capital from other sources. It also would have had to consider the efforts of APA to increase business and develop new revenue streams. Because the District Court's analysis did not require it to consider these additional efforts, the Third Circuit was duty bound to order a trial.

In sum, assuming *arguendo*, that this Court does not vacate the Third Circuit's decision and reinstate the decision of the District Court, a full evidentiary hearing is required. Such a hearing would permit the

exploration of the factual issues set forth above, via consideration of additional testimony and other evidence not previously reviewed, with corresponding analysis of credibility and sufficiency. Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions. Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 150, 120 S. Ct. 2097 (2000).

Finally, viewing the evidence in a light most favorable to APA, it cannot be said that no reasonable juror could find that APA met its burden of establishing it was *actively seeking capital or business*. The District Court, evaluating the same facts, concluded that no reasonable juror could find that APA had not met this test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2008

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-1050, 07-1051, 07-1052

[Filed August 29, 2008]

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS LOCAL UNION NO. 560,
Appellant No. 07-1050

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

BRIAN CAMPBELL; JOHN CRONIN JR.;
ANDREW IMPERATORE; OMER MASSE;
GARY PEGORARO; DEBORAH TETRO;
and RICHARD YURCISIN,
Appellants No. 07-1051

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION
TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY; TEAMSTERS
HEALTH AND WELFARE FUND OF
PHILADELPHIA AND VICINITY; and

TEAMSTERS LOCAL NO. 470,)
Appellants No. 07-1052)
)

On Appeal from the United States District Court
for the District of New Jersey
Honorable Garrett E. Brown, Jr.
(Civ. A. No. 02-CV-3480)

Argued March 11, 2008

Before: FUENTES, CHAGARES
and ALDISERT, Circuit Judges.

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OPINION

FUENTES, Circuit Judge.

APA Transport Corporation ("APA Transport") closed its facilities and terminated all of its employees on February 20, 2002. It had informed its employees of the impending shutdown and layoffs only a week earlier. Following the shutdown, a number of non-union and union employees, along with certain Employee Retirement Income Security Act ("ERISA") funds, filed suit against APA Transport and affiliated entities claiming that they had violated the notice provisions of the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101, et seq., which requires that an employer provide 60 days'

notice before a plant shutdown unless the employer qualifies for certain exceptions. On appeal, we address: (1) whether the ERISA funds have standing to sue under the WARN Act; (2) whether APA Transport and an affiliated company, APA Truck Leasing, could be considered liable pursuant to the WARN Act as a "single employer"; and (3) whether APA Transport qualifies for the "faltering company" exception to the notice provisions of the WARN Act.

I. Background

A. Facts of the Case

APA Transport was a trucking business founded in 1947 and dissolved on February 20, 2002. APA Transport's main offices were located in North Bergen, New Jersey, with other terminals and facilities throughout the Northeast. Pursuant to collective bargaining agreements, APA Transport's union employees were represented by Teamsters Local 470 ("Local 470") and Teamsters Local 560 ("Local 560").

The co-owners of APA Transport – Arthur Imperatore, Sr. and Armand Pohan – also owned more than 30 other companies at the time APA Transport closed, many of which continue to operate today. One of these companies is APA Truck Leasing, which is involved in leasing motor vehicles. Imperatore and Pohan were officers and directors of both APA Transport and APA Truck Leasing and – along with Fred Astle and Burton Trebour – directed the day-to-day affairs of both companies. The parties to this appeal dispute the degree to which APA Transport

and APA Truck Leasing were connected to each other.[1] Appellants[2] argue that the two companies were closely related, highlighting the following facts: the companies made non-formal loans to one another; APA Transport provided non-union employees of APA Truck Leasing with medical, pension, 401(k) and workers' compensation benefits; non-union employees of APA Truck Leasing received the same benefits as APA Transport employees; and APA Transport provided payroll, office supplies, accounting and other services for APA Truck Leasing. APA Transport, by contrast, contends that the two companies operated separately, and points to the following facts: APA Transport and APA Truck Leasing did not share employees; the companies handled the discipline of employees separately; the companies had separate contracts with different unions; and the companies maintained separate financial books and records.

On December 19, 1996, APA Transport entered into a Loan and Security Agreement ("Loan Agreement") with Transamerica Business Capital Corporation ("Transamerica"). The Loan Agreement provided APA Transport with a revolving credit facility that allowed it to borrow up to $40 million, secured by real property, equipment and accounts receivable. The Loan Agreement required APA Transport to provide Transamerica with regular reports as to outstanding

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[1] This dispute is significant because the degree to which the two entities were related determines whether they constitute a "single employer" under the WARN Act. See discussion infra at Section II.C.

[2] Appellants are the Employee Plaintiffs and the Plaintiff Funds. See definition infra at Section I.

accounts receivable and to comply with certain financial covenants.

Following the execution of the Loan Agreement, APA Transport suffered consistent losses. As a result, it defaulted on loan covenants on multiple occasions in 1999, 2000 and 2001. After each default, Transamerica and APA Transport negotiated agreements whereby the breaches were waived and/or the applicable covenants were amended. APA Transport was also negatively affected by the September 11, 2001 terrorist attacks because it conducted a significant amount of business in the New York City metropolitan area; following the attacks, APA Transport reported that its revenues fell 30 percent. As a result, APA Transport's reduced accounts receivable limited the amount of money it could continue to borrow from Transamerica under the Loan Agreement.

On October 24, 2001, Transamerica convened a meeting with APA Transport at Transamerica's offices to discuss how APA Transport was "going to operate going forward, given [its] losses." (Joint Appendix ("J.A.") 520a-521a.) The attendees included Pohan and Imperatore; Transamerica's president, Steven Fischer; and Transamerica representatives Christopher Norrito and Michael Burns. The Transamerica representatives expressed concern about the state of APA Transport's finances, communicated to Pohan and Imperatore that Transamerica would not continue to fund APA Transport's operating losses and indicated that Pohan and Imperatore would need to put additional capital into the company before Transamerica would extend

any additional financing.[3] APA Transport stated that it would seek additional financing, and Transamerica responded by stating that its "options were open" for extending the Loan Agreement. (J.A. 1465a.) However, APA Transport made no formal request at the meeting to secure additional financing or to extend the Loan Agreement.

In November 2001, Transamerica notified APA Transport that it was once again in default on the Loan Agreement. On December 10, 2001, Transamerica agreed to a fifth waiver and amendment to the Loan Agreement to cure those defaults.

The Loan Agreement was set to expire on February 28, 2002 (the "Termination Date"), at which point the entire loan amount was due. Under the Loan Agreement, any requests for extensions or renewals of the Loan Agreement were required to be in writing 60 days prior to the Termination Date. However, as of the end of 2001, APA Transport had made no written or oral request for Transamerica to extend or renew the Loan Agreement; the parties had not begun to gather the documentation required for such an extension or renewal; and APA Transport officials had taken no steps to invest additional capital in the company.

On January 2, 2002, Astle sent a letter (the "Astle Letter") to Norrito requesting additional financing for APA Transport, to be secured by mortgages on two

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[3] It was clear to both parties at this point that Transamerica was the only financial institution that would provide APA Transport with additional financing, given that APA Transport was so encumbered by the obligations of the Loan Agreement.

freight terminals owned by companies related to APA Transport. The letter asserted that each of the terminals was worth $4 to $5 million, and requested that Transamerica extend an additional loan of $5 to $6 million to be secured by mortgages on these properties. There is no evidence that work was undertaken on the preparation of appraisals, environmental reports or environmental indemnity agreements for these properties, all which would have been necessary to obtain the mortgages. Moreover, the Astle Letter did not specifically seek an extension or renewal of the Loan Agreement, nor did it mention the impending Termination Date.

On January 15, 2002, a second meeting was held between Transamerica and APA Transport to discuss the state of APA Transport's finances, with Pohan, Astle, Norrito, Burns and Fischer in attendance. At the meeting, Transamerica made no commitment with respect to additional financing; it also neither indicated that it would extend its loan beyond the Termination Date nor increased its lending to APA Transport.

On January 24, 2002, Pohan sent a letter to Fischer (the "Pohan Letter"). The letter stated that he was "renewing [the] request that Transamerica provide [APA Transport] with an additional loan to carry us through this recessionary winter and the losses attendant thereto." (J.A. 1042a.) It reiterated the offer made in the Astle Letter for APA Transport to arrange to secure additional financing with mortgages on the two terminals. The letter concluded by stating that Transamerica's "prompt response to this request is most urgent, since the ability of the ownership to fund

the anticipated losses in the next few weeks has just about been depleted." (Id.)

Transamerica did not respond to the Pohan Letter with a credit memorandum or credit approval. In the first week of February, Pohan had a phone conversation with a Transamerica representative, during which Pohan was informed that it would be difficult to persuade Transamerica's credit department to approve additional financing unless APA Transport's owners put additional money into the company. Then, on February 13, 2002, Transamerica sent APA Transport a letter formally notifying it that the Loan Agreement would terminate pursuant to its terms on February 28, 2002, and that Transamerica would not agree to extend the Loan Agreement to provide additional financing.

Unable to continue functioning without such financing, APA Transport shut its terminals on February 20, 2002. The first notice to employees of the shutdown was given in a February 11, 2002 letter from APA Transport to the president of Local 470, which was received on February 14, 2002. The letter stated that in accordance with the WARN Act, it was providing notice that APA Transport was permanently closing its terminal in Philadelphia, Pennsylvania effective February 20, 2002. The letter further stated that all employees at the location would be permanently laid off, and that APA Transport had given a "shortened" WARN notice because it had been

> actively seeking financial assistance to alleviate its severe economic problems. If APA [Transport] had provided an earlier shutdown notice, it would have precluded our ability to

> obtain the financing necessary to continue in business. APA [Transport] has now been notified that its request for this critical financing has been rejected and, accordingly, it can no longer afford to operate.

(J.A. 1047a). On February 14, 2002, APA Transport sent similar letters to representatives of Local 560 and to all non-union employees.

As a result of the shutdown, all APA Transport employees – those represented by Local 470, represented by Local 560 and non-union employees – were terminated. APA Transport paid no wages or benefits to any employee after February 22, 2002.

Approximately six weeks after the shutdown, APA Truck Leasing lent APA Transport between $10 and $15 million. The loan was secured by an Open-End Mortgage and Security Agreement dated June 5, 2002 on APA Transport's North Bergen terminal facility.

B. Procedural History

Several complaints were filed against APA Transport, APA Truck Leasing and certain other related entities (the "APA Entities")[4] beginning in 2002. These complaints alleged violations of ERISA and/or the WARN Act and sought back wages and benefits. One set of plaintiffs was comprised of two

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[4] These entities are: APA International Corporation; APA World Transport Corporation; Imperial Delivery Service, Inc.; and Transport Flexonomics, Inc. The Plaintiff Funds and the Employee Plaintiffs have not appealed the District Court's decision with respect to the APA Entities.

ERISA funds, the Teamsters Pension Trust Fund of Philadelphia and Vicinity and the Teamsters Health and Welfare Fund of Philadelphia and Vicinity (Local 470) (together, the "Plaintiff Funds"), which alleged violations of the WARN Act and ERISA. A second set of plaintiffs was comprised of a class of non-union employees and Local 560 (the "Employee Plaintiffs") who alleged violations of the WARN Act and ERISA.[5]

The cases were consolidated in the United States District Court for the District of New Jersey in May 2003,[6] after which both the Plaintiff Funds and the Employee Plaintiffs filed multiple amended complaints that added certain parties. Thereafter, APA Transport moved for summary judgment as to the claims asserted by the Plaintiff Funds, alleging that the Plaintiff Funds lacked standing. The Plaintiff Funds and the Employee Plaintiffs simultaneously filed motions for partial summary judgment asserting that the Plaintiff Funds had standing under the WARN Act; that APA Transport, APA Truck Leasing and the APA Entities should be considered a "single employer" for WARN Act purposes; and that APA Transport did not qualify for the so-called "faltering company"

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[5] There was a third plaintiff, the Freight Drivers and Helpers Local Union Number 577 ("Local 577"), which alleged violations of the WARN Act. The District Court granted summary judgment in favor of APA Transport, APA Truck Leasing and the APA Entities against Local 577 because those claims were brought by employees at facilities with fewer than 50 full-time employees and thus were statutorily excluded. Local 577 did not appeal the District Court's decision.

[6] The District Court had jurisdiction over these cases pursuant to 28 U.S.C §§ 1337 and 1367, and 29 U.S.C. § 2104(a).

exception to the WARN Act. APA Transport then filed a cross-motion for summary judgment as to the "faltering company" defense. At the same time, APA Truck Leasing and the APA Entities filed cross-motions for summary judgment regarding the "single employer" issue.

On December 7, 2006, without oral argument, the District Court granted APA Transport's summary judgment motion as to claims asserted by the Plaintiff Funds, holding that the Plaintiff Funds lacked standing under the WARN Act. The District Court also granted summary judgment to APA Transport on the "faltering company" defense. Finally, it granted APA Truck Leasing and the APA Entities summary judgment on the "single employer" issue, concluding that none of those companies could be considered a "single employer" with APA Transport. On December 13, 2006, the District Court dismissed all remaining issues as moot, and on December 29, 2006, entered final judgment.

A timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Discussion

There are three issues on appeal. We first consider whether the District Court was correct to conclude that the Plaintiff Funds do not have standing under the WARN Act. Next, we determine whether the District Court was correct to conclude that APA Transport and APA Truck Leasing did not constitute a "single employer" for WARN Act purposes. Finally, we address whether the District Court was correct to conclude that APA Transport qualified for the

"faltering company" exception to the WARN Act notice requirement.

Our review of all three legal issues, which were decided at summary judgment, is de novo. TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 199 (3d Cir. 2001). We construe the facts in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . [the moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©.

A. Brief Overview of the WARN Act

The WARN Act was enacted in 1986 in response to extensive worker dislocation that occurred in the 1970s and 1980s when employees lost their jobs, often without notice, as companies were merged, acquired or closed. The purpose of the WARN Act is to protect workers by obligating employers to give their employees advanced notice of plant closings. This allows workers who will be laid off time to "adjust to the prospective loss of employment, to seek and obtain alternative jobs and . . . to enter skill training or retraining that will allow [them] to successfully compete in the job market." Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs., 173 F.3d 175, 182 (3d Cir. 1999) (citation omitted).

The WARN Act provides that covered employers – generally, those that employ at least 100 full-time workers at a single site of employment – must provide 60 days' written notice before a closing or mass layoff. See 29 U.S.C. § 2101 et seq. The Act dictates that

notice be given to affected employees or their union representative, the state dislocated worker unit and the chief elected official of a unit of local government. Id. § 2102(a). Employers that violate the WARN Act are liable to their employees for back pay and benefits for each day notice is not provided, up to a maximum of 60 days. Id. § 2104. The WARN Act contains three exceptions to the notice requirement: the "faltering company" exception, the "business circumstances" exception and the "natural disaster" exception. Id. § 2102(b); 20 C.F.R. § 639.9.

B. Standing to Sue Under the WARN Act

The Plaintiff Funds, joined by the Employee Plaintiffs, contend that the District Court erred when it concluded that the Plaintiff Funds did not have standing to bring suit under the WARN Act. For the reasons that follow, we conclude that the District Court correctly determined that the Plaintiff Funds lack standing.

The WARN Act limits employer liability "to each aggrieved employee who suffers an employment loss." 29 U.S.C. § 2104(a)(1). It further enumerates who may bring a suit:

> A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

Id. § 2104(a)(5). The WARN Act defines the term "representative" with reference to labor organizations, which are the "exclusive representative[s] of employees" under federal labor law. Id. § 2101(a)(4). A "unit of local government" is defined as a "political subdivision of a State." Id. § 2101(a)(7).

The District Court concluded that the Plaintiff Funds did not have standing to sue under 29 U.S.C. § 2101(a)(4) because, although employee welfare and benefit plans are included in those benefits to which an aggrieved employee is entitled under the WARN Act, the Plaintiff Funds themselves "cannot be 'aggrieved employees' under the WARN Act." In re APA Transport Corp. Consol. Litig., No. 02-CV-3840, 2006 WL 3534029, at *6 (D.N.J. Dec. 7, 2006). In support of this position, the District Court adopted the analysis of United Mine Workers of America, District 12 v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893 (S.D. Ind. Aug. 31, 2001). There, plaintiffs alleging a violation of the WARN Act sued to recover, inter alia, contributions that their employers were required to have made to certain benefit funds during the violation period. Midwest Coal, 2001 WL 1385893, at *3. The court ruled that the plaintiffs were not entitled to recover the amount of the contributions because the WARN Act set forth the exclusive remedies for a violation of the Act in 29 U.S.C. § 2104, and contributions did not qualify as one of the remedies explicitly listed. Id. at *10. In addition, the court concluded that the plaintiffs were not entitled to recover contributions because "[n]one of the funds for which [the] [p]laintiffs seek contributions by [the defendant] qualifies as an 'aggrieved employee' under the [WARN] Act." Id. The District Court reasoned that if the benefit plans in Midwest Coal could not be

considered "aggrieved employees" under the WARN Act, neither could the plans here; and consequently, the Plaintiff Funds did not have standing. In re APA Transport Corp., 2006 WL 3534029, at *6.

On appeal, APA Transport argues that this reasoning is correct, and further argues that if employees are not entitled to ERISA contributions as part of their WARN Act damages, then the Plaintiff Funds have no claim upon which to sue. The Plaintiff Funds respond that the funds in Midwest Coal were not ERISA funds and argue that the analysis there is consequently not transferrable to this case. The Plaintiff Funds also cite United Mine Workers of Am. Int'l Union v. Martinka Coal Co., 45 F. Supp. 2d 521 (N.D. W.Va. 1999), aff'd, 202 F.3d 717 (4th Cir. 2000), for the proposition that contributions to ERISA plans are benefits that fall under the WARN Act damages rubric set forth in 29 U.S.C. § 2104(1)(B).[7] The Plaintiff Funds argue that because they are charged, pursuant to ERISA, with aggressively pursuing the funds to which they are entitled on behalf of the employees whom they serve, and because contributions to ERISA plans are benefits that can be recovered as damages when there has been a WARN Act violation, the Plaintiff Funds should be entitled to sue to recover those contributions.

We believe the parties' arguments are premature. The initial issue we must resolve – a question that

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[7] The court in Midwest Coal expressly disagreed with the decision reached by the court in Martinka Coal. See Midwest Coal, 2001 WL 1385893, at *10 n.7 (concluding that Martinka Coal was "wrongly decided").

both the District Court and the parties did not address – is whether the Plaintiff Funds can be considered "person[s]" permitted to seek enforcement of the WARN Act pursuant to 29 U.S.C. § 2104(a)(5). This is an issue of first impression in this Circuit and it appears that no other circuit has considered whether benefit plans should be considered "person[s]" under 29 U.S.C. § 2104(a)(5).

As noted above, the relevant provision of the WARN Act provides that a civil suit may be brought by "[a] person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3)." 29 U.S.C. § 2104(a)(5). The WARN Act fails to define the word "person." The rules of construction for federal statutes broadly define "person" as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" unless the "context [of the statute] indicates otherwise." 1 U.S.C. § 1.

Here, there is nothing in the context of the statute that indicates to us whether Congress intended to more narrowly proscribe those "person[s]" who can enforce the WARN Act. Nor does the language of the pertinent provision provide a clear answer. Rather, it states that the category "includ[es] representative[s] of employees or [] unit[s] of local government aggrieved under paragraph (1) or (3)." 29 U.S.C. § 2104(a)(5) (emphasis added). It is a well-established canon of statutory construction that when the word "including" is followed by a list of examples, those examples are generally considered illustrative rather than exhaustive. See, e.g., Massachusetts v. E.P.A., 127 S. Ct. 1438, 1476 (2007) (Scalia, J., dissenting) ("The

word 'including' . . . indicate[s] that what follows will be an 'illustrative' sampling of the general category that precedes the word."); United States v. Grassie, 237 F.3d 1199, 1215 (10th Cir. 2001) ("[W]e regard the statutory use of the word 'including' . . . as the preface for a representative or illustrative example, and not as a term of restriction or exclusion for anything not expressly specified."). But "canons [of construction] are not mandatory rules. They are guides that 'need not be conclusive.'" Chickasaw Nation v. United States, 534 U.S. 84, 85 (2001) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).

However, we need not decide whether the statute should be interpreted in a manner consistent with the canon based on the statute alone because authoritative regulations address the very question at issue. We have explained that when "a relevant statute is silent or ambiguous, we will defer to any reasonable regulations promulgated by the [agency charged with administering the statute]." Bd. of Tr. of Trucking Employees of N.J. Welfare Fund, Inc.-Pension Fund v. Kero Leasing Corp., 377 F.3d 288, 294 (3d Cir. 2004); see also Smriko v. Ashcroft, 387 F.3d 279, 295 (3d Cir. 2004) ("agency regulations 'have the force of law'" (quoting Marshall v. Lansing, 839 F.2d 933, 943 (3d Cir. 1988))); Martinka Coal Co., 202 F.3d at 720 n.2 (4th Cir. 2000) (WARN Act regulations have the force of law "unless they are irreconcilable with the clear meaning of a statute, as revealed by its language, purpose, and history" (internal quotation marks and citation omitted)). The Secretary of Labor is charged with "prescrib[ing] such regulations as may be necessary to carry out" the WARN Act. 29 U.S.C. § 2107(a). Here, the regulations promulgated by the

Department of Labor ("DOL") pertaining to "WARN Act enforcement" state that

> [e]nforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of § 3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary.

20 C.F.R. § 639.1(d) (emphasis added). This provision, unlike the related provision in the statute itself, indicates that only employees, union representatives and units of local government may bring suit. Neither party cites this regulation, much less contends that it is in "conflict with the plain language of the statute." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988). Consequently, we will apply the DOL regulation, which compels the conclusion that Plaintiff Funds are not "person[s]" that may enforce the WARN Act.

For the foregoing reasons, we conclude that the District Court correctly concluded that the Plaintiff Funds do not have standing to bring suit under the WARN Act.

C. "Single Employer"

We next address the question of whether APA Truck Leasing and APA Transport constitute a "single

employer" for WARN Act purposes. If the two entities are a "single employer" then we need not reach the question of whether APA Transport may avail itself of the "faltering company" defense, as APA Transport would not be able to demonstrate that it was "faltering" because it would have had adequate capital to operate. For the reasons that follow, we conclude that the District Court correctly determined that APA Transport and APA Truck Leasing cannot be considered a "single employer."

The WARN Act defines the term "employer" as "any business enterprise" that employs 100 or more full-time employees. 29 U.S.C. § 2101(a). The WARN Act does not define "business enterprise"; however, DOL regulations issued under the WARN Act provide that two or more affiliated companies may be considered a single business enterprise for WARN Act purposes. 20 C.F.R. § 639.3(a)(2). The regulations state that "independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as . . . a part of the parent or contracting company depending upon the degree of their independence from the parent." Id.

In Pearson v. Component Technology Corp., 247 F.3d 471 (3d Cir. 2001), we adopted the five factors listed in those regulations to create a balancing test that would determine whether related companies are liable under the WARN Act on "single employer" grounds. The five factors are as follows: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) dependency of operations. Id. at 487-90; 20 C.F.R. § 639.3(a)(2). We further indicated that the five-factor test was a

balancing test in which a number of facts and circumstances may be relevant. Pearson, 247 F.3d at 490. However, the factors are not balanced equally: the first and second factors, common ownership and common directors and/or officers, are not sufficient to establish that two entities are a "single employer." Id. at 494 ("ownership – and even ownership coupled with common management – is not a sufficient basis for liability").

In the context of summary judgment, we held that the "WARN Act test for intercorporate liability presents a question of fact," but noted that "[our] decision to characterize it as such does not preclude an inquiry as to whether plaintiffs have put forth enough evidence to create a genuine issue of material fact." Id. at 497. In fact, in Pearson itself, we applied the test and concluded that the "evidence proffered by the plaintiffs simply [did] not establish the high degree of integration required by the analysis set forth in this opinion" to survive summary judgment. Id. at 505.

Here, the District Court concluded that the evidence was not sufficient to create a genuine issue of material fact, and held that APA Transport and APA Truck Leasing[8] could not be considered a "single employer"

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[8] In Pearson, we noted that "[n]either the WARN Act itself, nor the regulations, explicitly discuss the statute's applicability to lenders," but rather focus on entities with parent-subsidiary relationships. 247 F.3d at 491. However, we ultimately concluded that "under some circumstances, a lender can become so entangled with its borrower's affairs so as to engender WARN Act liability." Id. Thus companies with a lendee-lender relationship – such as APA Truck Leasing and APA Transport – may be considered a "single employer" for WARN Act purposes. In any

for WARN Act purposes. While the Employee Plaintiffs had demonstrated (and APA Transport and APA Truck Leasing did not dispute) "common ownership" and "common directors and/or owners" (the first two factors), as APA Transport and APA Truck Leasing shared all of the same stockholders and maintained the same presidents and vice-presidents, the District Court then determined that the third, fourth and fifth factors weighed against the conclusion that APA Transport and APA Truck Leasing should be considered a "single employer." For the third factor, "de facto exercise of control," the District Court found that lower levels of management at the two companies were supervised on a company-by-company basis, and that as such there was autonomy in supervision. In re APA Transport, 2006 WL 3534029, at *13. The District Court also found that despite intercompany loans, the two companies were autonomous in terms of finances because each company had independent wage rates, pay scales, salaries and payrolls. Id. For the "unity of personnel policies emanating from a common source" factor, the District Court found that each company possessed its own employees and its own policies regarding compensation, vacation and sick time; that the companies hired and fired employees on an individual basis; and that, to a large extent, personnel files were maintained separately. Id. at *14. Finally, for the "dependency of operations" factor, the District Court relied on its analysis for the third and fourth factors and determined that it weighed in favor of APA

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event, APA Transport and APA Truck Leasing do not dispute the applicability of the Pearson framework.

Transport and APA Truck Leasing as well. Id.[9] As only the first two factors weighed in favor of the Employee Plaintiffs, and these two factors alone are not sufficient to demonstrate that two entities are a "single employer," the District Court concluded that APA Truck Leasing and APA Transport "[could not] reasonably be considered a 'single employer' for WARN Act purposes." Id.

On appeal, the Employee Plaintiffs do not dispute the underlying factual findings of the District Court, but contend that there is a genuine issue of material fact as to the ultimate question of whether APA Transport and APA Truck Leasing constitute a "single employer." We disagree. As we stated earlier, that the balancing test requires a fact-intensive analysis does not "preclude an inquiry as to whether plaintiffs have put forth enough evidence to create a genuine issue of material fact." Pearson, 247 F.3d at 491. We agree with the District Court that no reasonable juror, employing the five-factor test, could find that APA Transport and APA Truck Leasing were a "single employer."

As an initial matter, we think it important to consider the policy considerations that animate the WARN Act. The purpose of the Act is to penalize those

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[9] This approach was improper, because the analysis for the "dependency of operations" factor, which considers the general administrative structure of two related entities, differs from the analysis for the "de facto exercise of control" and "unity of personnel policy" factors, which look to decision-making and personnel policies of the two entities, respectively. However, despite this oversight, the District Court reached the proper conclusion for this factor.

employers that close a plant and fail to comply with the notice requirements of the statute. Thus, the question of whether two entities constitute a "single employer" for WARN Act purposes "is ultimately an inquiry into whether . . . two nominally separate entities operated at arm's length" or whether, following an "assessment of the amount of control" exercised by one entity over another, it can be determined that two entities should be considered jointly liable for the closing and the subsequent lack of notice. Id. at 495-96. Accordingly, the goal of the five-factor test here is to determine whether APA Truck Leasing had become "so entangled with [APA Transport's] affairs so as to engender WARN Act liability," or whether the two continued to function at arm's length as separate entities. Id. at 491.

Turning to the decision of the District Court, we note it was correct to conclude that the first two factors – "common ownership" and "common directors and/or owners" – are not sufficient to deem two entities a "single employer." The Employee Plaintiffs are thus incorrect to argue that they should survive summary judgment on the "single employer" issue solely because APA Truck Leasing and APA Transport were owned by the same individuals and shared directors and officers.

Consequently, the remaining three factors are determinative. Factor three looks to whether there was "de facto exercise of control" of APA Trucking by APA Transport or vice versa. The core of this factor is whether one company "was the decisionmaker responsible for the employment practice giving rise to the litigation." Id. at 503-04. Here, a review of the facts adduced by the parties indicates that while APA Truck Leasing may have made certain loans to APA

Transport and shared certain administrative functions, it was not "controlling" APA Transport and played no role in APA Transport's decision to close its facilities. Thus, factor three does not support a finding that APA Transport and APA Truck Leasing constitute a "single employer."

Factor four looks to whether there was a "unity of personnel policies." The overall question is whether the companies "actually functioned as a single entity with regard to [their] relationship[] with employees." Id. at 499. To reach an answer, we consider whether the two companies in question engaged in centralized hiring and firing, payment of wages, and personnel and benefits recordkeeping. See Vogt v. Greenmarine Holding, 318 F. Supp. 2d 136, 142-43 (S.D.N.Y. 2004). While the two companies did share certain benefit plans and some employee monitoring functions (specifically, APA Transport did the background security checks for APA Truck Leasing's new hires, and machinists at both companies were given the opportunity to bid for positions at the other company), there is no evidence that the two companies "actually functioned as a single entity" with regard to their respective employees. Pearson, 247 F.3d at 499. Employees were hired and fired independently; reported separately to supervisors at their respective companies; were paid from separate payrolls; reported tax obligations to the federal government under separate ID numbers keyed to their company; and had separate labor contracts. This factor also does not support a finding that APA Transport and APA Truck Leasing were a "single employer."

The fifth and final factor is whether there was a "dependency of operations" between the two

companies. To determine whether two companies are dependent on one another, we look to the "existence of arrangements such as the sharing of administrative or purchasing services, interchanges of employees or equipment, and commingled finances." Id. at 500 (citations omitted). Although the Employee Plaintiffs insist that the two companies commingled finances, the record indicates that the loans between APA Truck Leasing and APA Transport were made at arm's length. Moreover, APA Transport and APA Truck Leasing were clearly not "dependent" upon one another to continue operation, and there is no stronger evidence for this fact than that APA Truck Leasing continued to operate without incident after APA Transport folded. Thus, the fifth factor also cannot support a finding that APA Transport and APA Truck Leasing were a "single employer."

Because the final three factors are clearly in favor of APA Transport and APA Truck Leasing, and because a finding that two companies share the same ownership and certain directors (the first two factors) is not in and of itself sufficient to find that two entities were a "single employer," we conclude that no reasonable juror could find that APA Transport and APA Truck Leasing functioned as a "single employer" based on the facts presented. We therefore affirm the District Court's decision on this issue.[10]

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[10] In reaching its conclusion, the District Court stated that

> no genuine question of material fact has been set forth by [the Employee] Plaintiffs. [The Employee] Plaintiffs set forth facts that [APA Transport and APA Truck Leasing] do not refute, rather, [APA Transport and APA Truck Leasing] point to additional evidence to support their

D. The "Faltering Company" Exception

The Employee Plaintiffs' final argument is that the District Court erred when it granted summary judgment to APA Transport and APA Truck Leasing on the question of whether APA Transport qualified for the "faltering company" exception to the WARN Act notice requirement. As noted above, if we had determined that APA Truck Leasing and APA Transport were a "single employer" for WARN Act purposes, then the "faltering company" defense would

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> assertion that they are not "employers" under WARN. As such, the Court will apply the uncontradicted evidence provided to the DOL factors referenced by the Third Circuit Court of Appeals in determining whether [APA Transport and APA Truck Leasing] can be considered a single employer for WARN Act liability purposes.

In re APA Transport, 2006 WL 3534029, at *12. As we have held that the five-factor test for intercorporate liability is a question of fact, Pearson, 247 F.3d at 497, a district court cannot reach its own independent conclusion about how those factors should be balanced. Instead, a district court can only grant summary judgment for a defendant if no reasonable juror could engage in the appropriate balancing and determine that the two entities constitute a "single employer." If a reasonable juror could weigh the facts under the balancing test and come out either way – that is, if there is sufficient evidence in the record to support either finding – then the question of whether the two entities constitute a "single employer" must be submitted to a jury. See, e.g., Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 791 (9th Cir. 1996) (when the "law clearly envisions that [a] balancing test is normally reserved for the jury . . . summary judgment is only appropriate if after viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact"). To the extent that the District Court did its own balancing instead of determining whether no reasonable juror could reach a different outcome, it did so in error.

not be available because APA Transport would have had adequate capital to continue to operate. However, we have concluded that no reasonable juror could find that the two companies constitute a "single employer." Therefore, we must focus on the question of whether APA Transport has established the elements of its affirmative defense sufficient to survive summary judgment. For the reasons that follow, we conclude that APA Transport cannot avail itself of the "faltering company" defense.

The faltering company exception is an affirmative defense to liability, which means the employer bears the burden of establishing its elements. 20 C.F.R. § 639.9. As a threshold matter, a company seeking to qualify as a "faltering company" must demonstrate that it had inadequate capital to continue functioning and, as such, was in a "faltering" state. Id.

The statutory provision states that

> [a]n employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1). The DOL regulation interpreting the "faltering company" exception of the WARN Act breaks the provision into its component

parts, so that to benefit from the defense an employer must prove: (1) it was actively seeking capital at the time the 60-day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing. 20 C.F.R. § 639.9(a).

According to the Conference Report issued when Congress passed the WARN Act, the key elements of the defense, which is intended as a "narrow one," are

> that the employer was "actively seeking capital or business"; second that, had the employer obtained this capital or business, it "would have enabled the employer" to prevent or forestall the shutdown; and third, that the employer "reasonably and in good faith believed" that giving the notice required would have precluded the employer from obtaining the necessary capital or business that it had a realistic opportunity to obtain. Thus, to avail itself of this defense an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required, to obtain a loan, to issue bonds or stock, or to secure new business. This duty to seek capital or business falls on the employer . . . .

134 CONG. REC. S8686-01 (1988) (emphasis added). The central aspects of Congress's stated purpose have been codified in the DOL regulations; namely, that the faltering company defense should be construed

narrowly and that, to access the defense, the employer must demonstrate that it was taking the specific steps required "at the time that 60-day notice would have been required." 20 C.F.R. § 639.9(a)(1).

Before this Court, the Employee Plaintiffs challenge only the first two of the four elements of the defense, asserting that APA Transport was not actively seeking capital at the time the 60-day notice would have been required, and that it did not have a realistic opportunity to obtain that financing. The Employee Plaintiffs have thus conceded the final two elements (that the financing, if obtained, would have been sufficient to prevent a shutdown; and that APA Transport reasonably believed that giving WARN Act notice would have hindered its ability to get that financing), and we will not discuss them here. We note that for the two elements we will consider, we must conclude that APA Transport has established both elements in order to uphold the District Court's decision. Furthermore, we note that the parties do not argue that there are material underlying facts in dispute. Appellants' Br. at 48-52; Appellees' Br. at 18-22.

The District Court concluded that APA Transport had been "actively seeking" financing based on APA Transport's meeting with Transamerica on October 24, 2001 and its request at that time for additional financing. It stated that it was "not reasonable to insist that APA Transport take specific, actual and literal steps on December 20, 2001, when they had taken said steps on October 24, 2001." In re APA Transport, 2006 WL 3534029, at *17. The District Court explained that to require APA Transport to take such "specific, actual and literal steps" would

"effectively eliminate any practical application of the 'faltering business' exception as it would require said employer to read the minds of the financial institution or institutions from which it seeks its financing." Id.

On appeal, the Employee Plaintiffs assert that the District Court misstated the timeline of events in its opinion. The District Court found that at the October 24, 2001 meeting, APA Transport offered mortgages on two properties to secure additional financing from Transamerica. Our review of the record indicates that the Employee Plaintiffs are correct, as APA Transport did not offer those mortgages to Transamerica until January 2, 2002. APA Transport concedes this point.

The Employee Plaintiffs argue that this discrepancy is significant; although Transamerica and APA Transport discussed in general terms APA Transport's need for additional financing at the October 24, 2001 meeting, there was no affirmative attempt by APA Transport after that meeting to actually secure that financing. The offer of the properties did not occur until January 2, after the 60-day period set forth by the WARN Act had begun. On these facts, the Employee Plaintiffs contend that APA Transport cannot prove that it was "actively seeking" financing when the period began.

APA Transport makes two arguments in response. First, it agrees with the District Court that APA Transport was not required to take specific steps at or near the beginning of the 60-day window because such a requirement "ignores the reality that prediction of the date a company will need to shut down is not an exact science" and would mean that companies would be ineligible for the exception because they started

their financing efforts "too late to save the company." Appellees' Br. at 22. Second, APA Transport contends that it was in fact "actively seeking" financing at the beginning of the period. It argues that it indicated that it would seek additional financing from Transamerica at the October 24, 2001 meeting, and that once a "lender confirms that the borrower was seeking capital, that should be the end of the inquiry" as to whether the borrower was "actively seeking" capital. Id. at 19. APA Transport further contends that the Court should take into account that business decisions "can take some time and that the year-end holidays . . . occurred in the interim" so that there should have been no expectation that APA Transport would take additional steps in December 2001 to secure the financing. Id.

We turn first to APA Transport's argument that the District Court was correct to hold that it was "not reasonable to insist that APA Transport take specific, actual and literal steps on December 20, 2001," when the 60-day period began, In re APA Transport, 2006 WL 3534029, at *17, because "prediction of the date a company will need to shut down is not an exact science." Appellees' Br. at 22. This approach essentially asks this Court to read a "foreseeability" requirement into the faltering business exception: in APA Transport's view, if an employer does not foresee that it is 60 days away from a plant closing, it should not be held liable for failing to take specific steps at the time to secure financing. We believe such an approach runs counter to both the text and the purpose of the WARN Act.

The plain language of the statute states that a company must be actively seeking additional financing

"as of the time that notice would have been required." 29 U.S.C. § 2102(b)(1); see also 20 C.F.R. § 639.9(a) ("[a]n employer must have been actively seeking capital or business at the time that 60-day notice would have been required" (emphasis added)). In effect, the WARN Act establishes "strict liability": an employer must give notice 60 days prior to a plant closing, unless it can demonstrate that it falls within one of three specific enumerated exceptions: (1) the "faltering company" defense, (2) the "unforeseeable business circumstances" exception, or the (3) "natural disaster" defense. 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9. The "unforeseeable business circumstances" exception, which provides for a reduction in the notice period for "business circumstances that were not reasonably foreseeable" at the 60-day mark, with circumstances "not reasonably foreseeable" defined as "some sudden, dramatic, and unexpected action or condition outside the employer's control," indicates that Congress was not blind to the issue of foreseeability. 20 C.F.R. 639.9(b)(1). But APA Transport does not contend that it qualifies for the "unforeseen business circumstances" exception. Rather, APA Transports appears to contend that a company may qualify for the "faltering company" defense irrespective of whether it was actively seeking capital at the time notice was required, so long as it did not foresee the shutdown that occurred 60 days later. APA Transport does not point to any statutory language that supports its position. The DOL regulations, moreover, instruct that the "faltering company" exception is to be "narrowly construed." 20 C.F.R. § 639.9(a). To allow employers to invoke the defense by arguing that they did not know a shutdown was 60 days away would risk allowing the "faltering company" exception, which is an affirmative defense,

to swallow the statute. We are not unsympathetic to APA Transport's argument, but it is one that should be directed to Congress, not this Court. Our obligation is "limited to one of statutory interpretation." In re Columbia Gas Sys. Inc., 33 F.3d 294, 302 (3d Cir. 1994) ("when a statute is clear and unambiguous, policy arguments cannot deflect us from that interpretation"); see also Coraggioso v. Ashcroft, 355 F.3d 730, 734 (3d Cir. 2004) ("We are compelled . . . to interpret the statute as written."). Consequently, we conclude that the WARN Act does require that steps to "actively seek financing" be taken "at the time that 60-day notice would have been required." 20 C.F.R. § 639.9(a)(1).

We turn next to the question of whether APA Transport was in any event "actively seeking" financing on December 20, 2001 to a degree sufficient to assert the "faltering company" defense. We must assume that Congress included the word "actively" in the statute for a reason. See Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 591 (3d Cir. 1984) ("[W]e presume that the words Congress has chosen best reflect the legislative purpose." (internal quotation marks and citations omitted)); see also Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). The word "actively" is generally understood to mean "characterized by action rather than by contemplation or speculation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 22 (1993). The DOL regulations provide that "actively seeking" means "seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must

have been seeking additional money, credit or business through any other commercially reasonable method." 20 C.F.R. § 639.9(a)(1).

The record indicates that APA Transport and Transamerica met on October 24, 2001 to discuss APA Transport's future. We note that it was Transamerica, and not APA Transport, that requested the meeting; and that it was Transamerica, and not APA Transport, that affirmatively sought to discuss APA Transport's financial health. There is some confusion as to what exactly was said by Transamerica and APA Transport officials at the October 24, 2001 meeting.[11] However, even if we accept APA Transport's position that, at the end of that meeting, a representative of APA Transport stated that it would seek additional financing from Transamerica and that Transamerica told APA Transport that all of its "options were open" for extending the loan, (J.A. 1465a.), this single exchange – which did not constitute a formal request for financing – is insufficient to demonstrate that APA Transport was "actively seeking" financing from Transamerica as of October 24, 2001.

Moreover, the record is clear that between the October 24, 2001 meeting and the January 2, 2002 offer of two mortgaged properties APA Transport took

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[11] The District Court appeared to resolve this dispute by crediting the testimony of a Transamerica executive, stating that his recollection of the meeting "settled that dispute" as to the definitive version of events. In re APA Transport, 2006 WL 3534029, at *16. To do so at summary judgment is improper. See Country Floors, Inc. v. P'ship Composed of Gepner and Ford, 930 F.2d 1056, 1061 (3d Cir. 1991) ("credibility evaluations are inappropriate in deciding a motion for summary judgment").

no steps to secure additional financing from Transamerica. Nor did APA Transport take any specific steps to seek an extension of the Loan Agreement which it knew was set to expire on February 28, 2002.[12] APA Transport knew that the terms of the Loan Agreement required that a request for such an extension had to be made in writing; no such request was made at any time prior to the 60-day period (or afterwards). APA Transport's actions can, at best, be characterized as waiting for Transamerica to offer additional financing. This cannot be squared with the requirement that APA Transport be "actively seeking" additional financing.

We therefore conclude that no reasonable juror could find that APA Transport met its burden for prevailing on this element of the defense. As APA Transport must fulfill all four requirements of the "faltering company" affirmative defense in order to qualify for the defense, we conclude that the District Court erred in granting summary judgment to APA Transport on this issue.

III. Conclusion

For the foregoing reasons, we affirm the District Court's judgment that the Plaintiff Funds do not have standing pursuant to the WARN Act and that APA Transport and APA Truck Leasing cannot be considered a "single employer." We reverse the District

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[12] While APA Transport did sign an agreement with Transamerica on December 10, 2001 to cure certain defaults in the existing loan with Transamerica, this agreement did not secure any additional financing for APA Transport. Nor did APA Transport seek any additional financing in conjunction with the agreement.

Court's judgment that APA Transport presented evidence sufficient to establish the "faltering company" affirmative defense, and remand with instructions that the District Court grant summary judgment to the Employee Plaintiffs on this issue, and for further proceedings.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-1050, 07-1051, 07-1052

[Filed August 29, 2008]

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS LOCAL UNION NO. 560,
Appellant No. 07-1050

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

BRIAN CAMPBELL; JOHN CRONIN JR.;
ANDREW IMPERATORE; OMER MASSE;
GARY PEGORARO; DEBORAH TETRO;
and RICHARD YURCISIN,
Appellants No. 07-1051

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY; TEAMSTERS
HEALTH AND WELFARE FUND OF
PHILADELPHIA AND VICINITY; and
TEAMSTERS LOCAL NO. 470,
Appellants No. 07-1052

On Appeal from the United States District Court
for the District of New Jersey
Honorable Garrett E. Brown, Jr.
(Civ. A. No. 02-CV-3480)

Argued March 11, 2008

Before: FUENTES, CHAGARES
and ALDISERT, Circuit Judges.

JUDGMENT

This cause came to be heard on March 11, 2008, on the record from the United States District Court for the District of New Jersey. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the orders of the District Court entered on December 29, 2006 are hereby AFFIRMED IN PART and REVERSED IN PART. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron, Clerk

Dated: August 29, 2008

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-1050, 07-1051, 07-1052

[Filed October 27, 2008]

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS LOCAL UNION NO. 560,
Appellant No. 07-1050

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

BRIAN CAMPBELL; JOHN CRONIN JR.;
ANDREW IMPERATORE; OMER MASSE;
GARY PEGORARO; DEBORAH TETRO;
and RICHARD YURCISIN,
Appellants No. 07-1051

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY; TEAMSTERS
HEALTH AND WELFARE FUND OF
PHILADELPHIA AND VICINITY; and

TEAMSTERS LOCAL NO. 470,
Appellants No. 07-1052

On Appeal from the United States District Court
for the District of New Jersey
Honorable Garrett E. Brown, Jr.
(Civ. A. No. 02-CV-3480)

Argued March 11, 2008

Before: FUENTES, CHAGARES
and ALDISERT, Circuit Judges.

(Opinion Filed August 29, 2008)

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ORDER AMENDING OPINION

FUENTES, Circuit Judge.

IT IS NOW ORDERED that on Page 9, the two sentences in the first paragraph beginning with "One set of plaintiffs was comprised of..." and ending with "who alleged violations of the WARN Act and ERISA" be replaced with the following:

> One set of plaintiffs was comprised of two ERISA funds, the Teamsters Pension Trust Fund of Philadelphia and Vicinity and the Teamsters Health and Welfare Fund of

Philadelphia and Vicinity ("Plaintiff Funds"), which together with Teamsters Local 470 ("Employee Plaintiffs"), alleged violations of the WARN Act and ERISA. A second set of plaintiffs was comprised of a class of non-union employees and Local 560 (also "Employee Plaintiffs") who alleged violations of the WARN Act and ERISA.

By the Court,

/s/ Julio M. Fuentes
Circuit Judge

Dated: October 27, 2008

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

docket in
Case Nos. 02-CV-3480 (GEB) only
02-CV-5367 (GEB)
03-CV-610 (GEB
03-CV-1583 (GEB)

[Filed December 29, 2006]

In Re:	)
	)
A-P-A TRANSPORT CORP.	)
CONSOLIDATED LITIGATION,	)
	)

CIVIL ACTION

JUDGMENT

This matter having come before the Court on Motions by the Plaintiffs, Teamsters Local Union No. 560, the Teamsters Pension Trust Fund of Philadelphia and Vicinity, the Teamsters Health and Welfare Fund of Philadelphia and Vicinity, Teamsters Local Union No. 470, Freight Drivers and Helpers Local No. 557, and the class of certified non-union Plaintiffs on Motions for Summary Judgment pursuant to Federal Rule of Civil Procedure Rule 56

(Docket Entry Nos. 101, 103, 104, 111, 116, 119, 121, 123 and 125) and for the reasons set forth in the Memorandum of Opinion dated December 7, 2006, those Motions have been denied; and

WHEREAS, Defendant, APA Transport Corporation, filed a Motion for Summary Judgment based on the faltering business exception defense (Docket Entry No. 111) and the Court finding that there are no disputes of material fact and that the Defendant is entitled to Judgment as a matter of law; and for the reasons set forth in the Memorandum of Opinion dated December 7, 2006:

THEREFORE:

IT IS ON THIS 29th DAY OF December, 2006 ORDERED as follows:

1. Judgment is entered in favor of Defendants, A-P-A Transport Corporation, A-P-A Truck Leasing Corp., A-P-A International Corp., A-P-A World Transport Corp., Imperial Delivery Service, and Transport Flexonomics, and against Plaintiffs, Teamsters Local Union No. 560, Teamsters Pension Trust Fund of Philadelphia & Vicinity, Teamsters Health and Welfare Fund of Philadelphia and Vicinity, Teamsters Local Union 470, Freight Drivers and Helpers Local Union 557, Brian Campbell, et. al. and the class certified non-union Plaintiffs;

2. Plaintiff's Complaints are hereby dismissed with prejudice.

/s/ Garrett E. Brown
Honorable Garrett E. Brown, Jr.
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 02-3480 (GEB)

[Filed December 7, 2006]

IN RE: APA TRANSPORT CORP.)
CONSOLIDATED LITIGATION)
)

MEMORANDUM OPINION

BROWN, Chief Judge

This matter comes before the Court upon motions by Plaintiffs (in whole or in part) and Defendants (in whole or in part) for summary judgment (partial or total) pursuant to Federal Rule of Civil Procedure 56 [Docket Entry ##'s 101, 103, 104, 111, 116, 119, 121, 123 and 125] and a motion to dismiss [Docket Entry # 106]. The action was reassigned to the undersigned on September 26, 2006, and the Court, having read and fully considered all of the parties' submissions, has decided this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons discussed below: Defendants' motion for summary judgment seeking to have all claims of employees from terminals that employed fewer than 50 full-time employees dismissed [Docket Entry # 101] is granted; Defendants' motion for summary judgment seeking the

dismissal of Counts Two and Three of the Third Amended Complaint [Docket Entry # 103] is granted; Plaintiffs' motion for summary judgment [Docket Entry # 104] is denied; Defendants' motion to dismiss [Docket Entry # 106] pursuant to Rule 12(b)(6) is denied; Defendants' motions for summary judgment regarding employer status (except for APA Transport) [Docket Entry ##'s 116, 119, 121, 123 and 125] is granted; and Defendant APA Transport's motion for summary judgment [Docket Entry # 111] regarding the faltering business exception is granted.

I. BACKGROUND - GENERAL FACTS

The general facts relevant to all pending motions addressed in this Opinion are as follows. APA Transport, a trucking business which was a regional LTL (less than truck load carrier), was founded as a company in or about 1947 and dissolved on or about February 20, 2002. On February 14, 2002, APA Transport notified its employees of its intention to close its terminals. On February 20, 2002, APA Transport closed its terminals and other facilities. Prior to its closure, APA Transport operated 25 trucking terminals in 25 different locations across 10 states and Puerto Rico, with its main offices in North Bergen, New Jersey. The owners of APA Transport also owned approximately 33 other companies at the time APA Transport closed. Those companies continued to operate at the time of APA Transport's shut down and many are still conducting business today.

On July 19, 2002, the first Complaint was filed. Numerous additional Complaints were filed by different Plaintiff groups and those Complaints were

amended numerous times. The District Court granted a class certification motion filed by non-union employee Plaintiffs on November 16, 2005. The non-union Plaintiffs Third Amended Class Action Complaint [Docket Entry # 63] contains a single count that alleges violations of the WARN Act and ERISA by Defendants. The three count Third Amended Complaint by the Teamsters Pension Trust Fund of Philadelphia and Vicinity and the Teamsters Health and Welfare Fund of Philadelphia and Vicinity (Local Union No. 470) [Docket Entry # 60] alleges violations of the WARN Act and ERISA by Defendants. The single count Second Amended Complaint by Teamsters Local Union Number 560 [Docket Entry #61] alleges violations of the WARN Act and ERISA by Defendants. The single count Third Amended Complaint by Freight Drivers and Helpers Local Union Number 557 [Docket Entry # 64] alleges violations of the WARN Act by Defendants.

II. STANDARD OF REVIEW

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996); Healy v. New York Like Ins. Co., 860 F.2d 1209, 1219, n.3 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989); Hersh v. Allen Prod. Co., 789 F.2d 230, 232 (3d Cir. 1986). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250

(1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor). In deciding whether triable issues of fact exist, the Court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." Anderson, 477 U.S. at 255-56.

Under the rule, a movant must be awarded summary judgment on all properly supported issues identified in its motion, except those for which the non-moving party has provided evidence to show that

a question of material fact remains. See Celotex, 477 U.S. at 324. Put another way, once the moving party has properly supported its showing of no triable issue of fact and of an entitlement to judgment as a matter of law, for example, with affidavits, which may be "supplemented . . . by depositions, answers to interrogatories, or further affidavits," id., "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, n.12; see also Anderson, 477 U.S. at 247-48 ("[B]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion . . . the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

What the non-moving party must do is "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324: see also Lujan v. National Wildlife Fed., 497 U.S. 871, 888 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit."); Anderson, 477 U.S. at 249; Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) ("To raise a genuine issue of material fact . . . the [non-moving party] need not match, item for item, each piece of evidence proffered by the movant" but rather must exceed the 'mere scintilla' threshold.), cert. denied, 507 U.S. 912 (1993).

III. DISCUSSION

A. Summary Judgment Motion Regarding All APA Transport Locations Employing Fewer than 50 Full-Time Employees (Docket Entry # 101)

The first summary judgment motion filed is by all Defendants and seeks to have all claims of employees from terminals that employed fewer than 50 full-time employees dismissed, asserting that their WARN Act claims are excluded by statute. The non-union Plaintiffs have opposed Defendants' motion for summary judgment by asserting that those locations that contained fewer than 50 full-time employees were still "affected employees" and thus entitled to the same protections that larger work sites with more than 50 full-time employees receive.

The Worker Adjustment and Retraining Notification Act (hereinafter "WARN") is codified under Title 29 of the United States Code, Section 2101, et seq. The WARN Act functions as a protective device to prevent the surprise terminations of large groups of employees, and the social and economic consequences that result from said terminations. The WARN Act effectively bars employers with 100 or more employees from ordering a "plant closing" or a "mass lay-off" unless at least 60 days' advance written notice is provided to each employee who will be terminated as a part of, or as a reasonably foreseeable consequence of, the plaint closing or mass lay-off. 29 U.S.C. §§ 2101(a)(1) and 2102(a)(2). A plant closing or mass lay-off that occurs without the required notice for the required period of time subjects the employer to liability for pay and benefits for each "affected

employee" for the number of days notice was not given, up to and including 60. 29 U.S.C. § 2104.

A "plant closing" is defined in Section 2101(a)(2) of Title 29 as:

> the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

"Affected employees" are defined in 29 U.S.C. § 2102(a)(5) as those "employees who may reasonably be expected to experience an employment loss as a consequence of a plant closing or mass lay-off." A "part-time employee" is defined in 29 U.S.C. § 2101(a)(8) as an "employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required."

A "single site of employment" is not defined within the statute. In an effort to define the phrase, the Third Circuit Court of Appeals turned to relevant Department of Labor regulations (see Gorini v. AMP Inc., 94 Fed.Appx. 913 C.A.3 at 10 (3d Cir. 2004) (citing Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139, 145 (3d Cir. 1998)) and held that a single site of employment is defined as either a single location or a group of locations in reasonable geographic proximity under the same management

with the same operational purpose. Gorini at 10 (citing 20 C.F.R. § 639.3(1) (2003)).

In Gorini, the Third Circuit held that a group of buildings in a city was a single site of employment for purposes of the WARN Act applicable to mass lay-off at a single site of employment, although the sites were not absolutely contiguous as they were separated by streets and highways. The Court opined that it was enough that the sites in question were all contained within the city of Harrisburg, were close together, and shared employees, job functions and services. Id. at 10. The Court further stated in a footnote that the defendant's claim that certain sites were not contiguous because they were separated by streets and highways was not viable because Pennsylvania law extended the title of property abutting a street to the center of the street. Id. at fn. 5.

In consideration of the circumstances at bar, the Court notes that the nineteen terminals that contained less than 50 employees each at the time of the closure were at least 31 miles away from another APA site, and as far as 296 miles from another APA site. Further, one of the terminals was located in Puerto Rico and was the only APA site located on the island. Additionally, the certification of Mr. Fred Astle submitted by Defendants asserts that neither equipment nor personnel were shared with any other APA site.

Although management and operational purposes were not specifically addressed by Defendants in the instant summary judgment motion, the apparent autonomy each site exercised due to the significant geographical distance between them can itself support

a finding that the nineteen terminals in question are each single sites of employment for WARN Act purposes. See Frymire v. Ampex Corp., 61 F.3d 757, 766 (10th Cir. 1995) (noting that DOL regulations hold that proximity and contiguity "are the most important criteria" for making a single site determination and they "in fact, establish whether a site will be presumed a single or multiple site."); see also Williams v. Phillips Petroleum, 23 F.3d 930 (5th Cir. 1994) (where 600 employees were laid off at the main facility and 27 more at three satellite locations, the court determined that the 27 employees did not have WARN Act status because they were not employed at the main facility). Moreover, in the present case, the fact that none of the facilities in question shared equipment or employees further supports the conclusion that the nineteen terminals were single sites.

Although the definition of "affected employees" itself suggests that employees of sites maintaining less than 50 employees would be protected under the WARN Act, the "affected employees" definition cannot be read in isolation. It must be contemplated in conjunction with the 50-employee requirement set forth by the WARN Act. If not, the 50-employee requirement would, in most circumstances, be rendered unenforceable. Clearly, Congress intended to have a 50-employee minimum which is to be applied in every circumstance in which a single site of employment is found, whether there is one physical location in which 50 or more employees are housed, or whether there are multiple single sites of employment, with varying numbers of employees. As such, APA sites where less than 50 employees were employed are not protected under the WARN Act, and the WARN

claims asserted by employees at such sites shall be dismissed as a matter of law.

B. Summary Judgment Motion Regarding Counts Two and Three of the Third Amended Complaint (Docket Entry # 103)

The second summary judgment motion filed by all Defendants seeks to have Counts Two and Three of the Third Amended Complaint filed by Plaintiffs Teamsters Pension Trust Fund of Philadelphia & Vicinity, Teamsters Health & Welfare Fund of Philadelphia & Vicinity and Teamsters Local Union No. 470 dismissed (hereinafter "Plaintiffs" or "the Funds"). Defendants assert that the WARN Act provides protection for employees, unions and local governments affected by a mass termination, lay-offs or plant closings, but not for benefit funds and that as such, the named Plaintiffs do not have standing under the WARN Act to sue and Counts Two and Three of the named Plaintiffs Third Amended Complaint must be dismissed.

The WARN Act, Title 29, United States Code, Section 2104(a)(5) provides that a "person seeking to enforce such liability, including a representative of employees or a unit of local government . . . may sue either for such person or for other persons similarly situated, or both . . .". Section 2101(a)(4) defines "representative" as labor organizations which are the "exclusive representative of employees" under federal labor law. Section 2101(a)(7) defines "unit of local government" as a "political subdivision of a State."

Employer liability under the WARN Act is governed by 29 U.S.C. § 2104(a)(1), which provides: "(1) Any

employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for - (A) backpay for each day of violation . . .; and (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses . . ." Section 1002(3) defines "[T]he term 'employee benefit plan' or 'plan'" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

In consideration of the foregoing, the Court first notes the plain language of Section 1002(3) and Congress' clear intent to include employee welfare and pension benefit plans among those benefits that an aggrieved employee is entitled to under the WARN Act. See American Tobacco Company v. Patterson, 456 U.S. 63, 68 (1982) (statutory construction begins with the language of Congress and "we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used' . . . "thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"). Other courts have found these benefit plans to be included in the calculations of damages under WARN as well. See United Mine Workers of America Intern. Union v. Martinka Coal Co., 45 F.Supp.2d 521 (N.D.W.Va. 1999); Gorini v. AMP Inc., 94 Fed. Appx. 913 (3d Cir. 2004); Ciarlante v. Brown & Williamson Tobacco Corporation, 1996 WL 741973 at * 3 (E.D.Pa. 1996), rev'd on other grounds, 143 F.3d 139 (3d Cir. 1998) (if continuation of payments to ERISA benefit plans was mandated by contract, such

fringe benefits should be included in the damage calculation under WARN).

The Court must next consider whether the Funds are "aggrieved employees" for purposes of damages as contemplated within the WARN Act. Sections 2105(a)(4), (a)(5) and (a)(7) do not explicitly contemplate employee benefit plans as aggrieved employees when those statutory provisions are plainly read. See United Mine Workers of America, District 12, et al., v. Midwest Coal Co., 2001 WL 1385893 at * 10 (S.D.Ind. 2001) ("[n]one of the funds for which Plaintiffs seek contributions by [defendant] qualifies as an 'aggrieved employee' under the [WARN] Act"; finding "tension" between the definition of "aggrieved employee" and section 2104(a)(1) which provides damages for affected benefit plans in the calculations of damages under WARN).

Although the Court acknowledges Midwest is not precedential, its reasoning is sound. Simply, the Funds cannot be "aggrieved employees" under the WARN Act. As such, these Plaintiffs do not have standing to sue under the WARN Act. Because they cannot sue on that basis, any ERISA-type of claims Plaintiffs may have are outside the WARN Act purview. As Plaintiffs base Counts Two and Three of their Complaint upon WARN Act violations which allegedly resulted in ERISA violations, those counts cannot stand without Plaintiffs ability to allege WARN Act violations. Therefore, Counts Two and Three of Plaintiffs' Third Amended Complaint shall be dismissed.

C. Summary Judgment Motions by Plaintiffs and Individual Defendants (Docket Entry ##'s 104, 111, 116, 119, 121, 123 and 125)[1]

All remaining summary judgment motions can be jointly addressed as they are premised under identical theories of law. Summary Judgment Motions Docket Entry ##'s 111, 116, 119, 121, 123 and 125 are by individual Defendants and are, in part, duplicative of Summary Judgment Motion Docket Entry # 104, which is the catalyst for the remaining summary judgment motions. The Court will therefore begin with Summary Judgment Motion Docket Entry # 104, and apply the established law to the individual facts applicable in the remaining summary judgment motions. The motion to dismiss filed by Defendants will be addressed thereafter.

Summary Judgment Motion Docket Entry # 104 is a motion by all Plaintiffs seeking partial summary judgment as to liability under the WARN Act against Defendants APA Transport Corp., APA Trucking Leasing Corp., APA International Corp., APA World Transport Corp., Imperial Delivery Service, Inc. and Transport Flexonomics, Inc. For purposes of this motion, Plaintiffs assert that Defendants failed to provide the required 60 day notice of closure under the WARN Act. Plaintiffs further assert that the only communication they received by Defendants regarding APA Transport's shut down were letters that were

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[1] The Court notes that three Summary Judgment Motions currently listed as active on the docket, specifically, Docket Entry ##'s 129, 131 and 133, are no longer viable as the parties stipulated to the dismissal of the Defendants against whom the motions are asserted.

received six days prior to its closure. (Plaintiffs' Motion, p. 8). Plaintiffs argue that neither exception available under the WARN Act (the "faltering company" defense and the "unforeseeable business circumstances" defense) is applicable in the present case. (*Id.* at p. 9).

In support of that argument, Plaintiffs assert that Defendants were not "actively seeking" nor taking any "specific actions" to secure financing, as required under the faltering company defense. (*Id.* at p. 10). Plaintiffs assert that because Defendants shut down operations on February 20, 2002, they were required to provide WARN notices no later than December 20, 2001. (*Id.*). However, Plaintiffs argue, on December 20, 2001, Defendants were not actively seeking financing and were not taking any specific actions to obtain financing from Transamerica, Defendants then current financial source. (*Id.*). Further, Plaintiffs argue, due to financial covenants contained in the then-binding Loan Agreement, Defendants were contractually obligated to Transamerica as Defendants only possible source of financing. (*Id.*).

Specifically, Plaintiffs argue that on October 24, 2001, APA Transport's President and CEO Armand Pohan and APA Transport's Vice President and CFO Fredric Astle met with Transamerica "to determine if APA Transport could continue in business." (*Id.* at p. 11). Plaintiffs further argue that at that meeting Transamerica specifically indicated that it would not fund operating losses of Defendants and would not increase its financing unless APA Transport owners contributed further capital. (*Id.*). Plaintiffs argue that APA Transport never indicated that the owners ever intended to increase their investment in APA

Transport, but rather, that Mr. Pohan was contemplating an "exit strategy" for the company by attempting to merge with competitor New Penn Motor Express, Inc. (*Id.*).

Plaintiffs argue that by late December, 2001, Defendants had not made any financing proposals to Transamerica. (*Id.*). The first communication with Transamerica occurred via written correspondence dated January 2, 2002, from Mr. Astle to Christopher Norrito, a Transamerica account executive charged with handling APA's account, which requested a five to six million dollar loan based upon the proposed mortgaging of two freight terminals owned by companies affiliated with APA. (*Id.*). Plaintiffs argue that this was Defendants first attempts to obtain financing and was well beyond the December 20, 2001 notification deadline, or in the alternative, the deadline by which Defendants must have been actively seeking or taking specific steps under the faltering business defense. (*Id.*).

Plaintiffs further argue that in May, 2001, Defendants began negotiations for an amendment to the Transamerica Loan Agreement under which Transamerica had provided additional financing. (*Id.* at p. 12). During the negotiations, Transamerica required mortgages on terminal facilities owned by a related company as collateral for the previous loan received. (*Id.*). Plaintiffs argue that negotiations which resulted in the Fourth Amendment began in December, 2000. Negotiations, preparation and execution of the Fourth Amendment to the Loan Agreement concluded on or about May 24, 2001. (*Id.*). After the Fourth Amendment to the Loan Agreement was signed, Plaintiffs assert there was no further

"realistic opportunity to obtain financing" (as additionally required to be shown under the faltering business defense) through Transamerica as there could not have been any reasonable belief that Transamerica would agree to lend any more money to Defendants, and because APA Transport was contractually unable to attempt to obtain funding elsewhere. (*Id.* at p. 13). In support of that assertion, Plaintiffs demonstrate that in the year prior, in or about December, 2000, in which APA Transport had operated at a loss in all but two of its 13 reporting periods for year 1999, APA Transport had reached its limits with financing available to it through the revolving credit facility (a provision in Transamerica's Loan Agreement). (*Id.*).

Plaintiffs additionally assert that after the events of September 11, 2001, financial difficulties for APA Transport "profoundly worsened." Plaintiffs support that assertion by presenting comparisons of revenues and operating ratios in fiscal years 2000 and 2001 and subsequent accounting periods. (*Id.* at p. 15).

Plaintiffs argue that two weeks after the October 24, 2001 meeting, Transamerica formally notified APA Transport that due to its failure to comply with several financial covenants of the Loan Agreement and with certain obligations of the Fourth Amendment, APA Transport was in default. (*Id.* at p. 16). Thereafter, on or about December 10, 2001, the parties agreed to another amendment to the Loan Agreement, entitled the Fifth Amendment, intended to cure the defaults listed by Transamerica in its November, 2001, correspondence. (*Id.* at p. 17). Plaintiffs argue that the Fifth Amendment did not increase funding, provide for any future increase in financing, or extend any terms of the Loan Agreement regarding reimbursement for

loans previously made by Transamerica. The Fifth Amendment, Plaintiffs argue, simply allowed APA Transport auditors additional time to locate missing audit reports for the years 1999 and 2000 in order to satisfy the November, 2001 notice of default. (*Id.*). Plaintiffs further argue that any increase in funding by Transamerica would have required an amendment to Transamerica's credit approval, or a new approval, and that no such amendment or approval was ever sought by APA Transport or granted by Transamerica. (*Id.*). As such, Plaintiffs argue, Defendants fail to demonstrate that they were either actively seeking or taking specific actions in or around the December 20, 2001 deadline of notification date.

Further, Plaintiffs assert, in order to allege the unforeseeable business circumstances defense, Defendants must be able to demonstrate that the circumstance on which they relied was caused by "some sudden, dramatic, and unexpected action or condition" outside of their control. Plaintiffs argue that Defendants' dismal financial condition in February, 2002 was not sudden, dramatic or unexpected, as Defendants were losing money for the two years prior, and increased losses should have been expected post September 11, 2001. (*Id.* at p. 21).

Lastly, Plaintiffs argue that even if Defendants satisfied the requirements of the faltering company or unforeseeable business circumstances defenses they would nevertheless be precluded from relying on these defenses because they failed to give a brief "specific" statement of the basis for reducing the notification period as required under the WARN Act. Plaintiffs assert that the language of APA's notification does not specify why earlier notice was not given nor did it

explain the "severe economic problems" to which it referred. Further, the notification did not explain who APA sought financing from, why the financing was denied, or when APA learned that its request for funding was rejected. (*Id.*).

Defendants provide two separate oppositions to Plaintiffs' motion for summary judgment. Defendant APA Transport Corporation responds to Plaintiffs' motion by filing an opposition brief which refers this Court, in part, to APA Transport's motion for summary judgment. In that motion, APA Transport asserts that Transamerica was APA Transport's principal financial lender since 1996 as a result of a Loan and Security Agreement executed in December of that year. (Defendant's Summary Judgment Motion, Docket Entry # 112, ¶ 2). Transamerica had provided financing to APA Transport pursuant to a revolving credit plan with a cap of $40 million and a February 28, 2002 maturation date. (*Id.* at ¶ 3). APA Transport further asserts that Transamerica was familiar with its financial situation when it sought additional financing on October 24, 2001, as it had defaulted on loan conditions in 1999, 2000 and 2001, and because of its worsened financial condition post September 11, 2001. (*Id.* at ¶¶ 5-7).

Defendant APA Transport continues by asserting that when Mr. Astle and Mr. Pohan met with Transamerica officials on October 24, 2001, and requested four to five million dollars (offering properties owned by other companies as additional collateral for the proposed loan), Transamerica gave no negative indications. (*Id.* at ¶¶ 9-12). APA Transport further asserts that its senior officers believed that they would receive the loan for additional financing

because Transamerica had agreed to loans in the past and had never previously denied a request for additional monies and had accommodated prior defaults without calling in the existing loan. (*Id.* at ¶ 13).

APA Transport argues that it did not hear from Transamerica until February 13, 2002, when the loan request was denied. (*Id.* at ¶ 15). Thereafter, APA Transport argues, it decided to shut down its operations due to lack of sufficient funds to continue to operate or fund payroll beyond February 21 or 22, 2002. (*Id.* at ¶ 20). Notification in the form of a reduced WARN notice to all employees of APA Transport or their legal representatives were sent on February 14, 2002. (*Id.* at ¶¶ 23-24). APA Transport further argues that if a WARN notice had gone out prior to Transamerica's loan determination, it would have adversely impacted Transamerica's decision to extend financing, caused losses within APA Transport's client base, and diminished or destroyed any chance of Transamerica even considering a loan request. (*Id.* at ¶¶ 25-26).

The remaining defendants, APA Trucking Leasing Corp., APA International Corp., APA World Transport Corp., Imperial Delivery Service, Inc. and Transport Flexonomics, Inc. combined to submit a second opposition to Plaintiffs' summary judgment motion. These defendants join APA Transport's argument that it is not liable and qualifies as a faltering business, but they further argue that APA Transport was the only "employer" of the individual Plaintiffs within the meaning of the WARN Act, and that as such, only Defendant APA Transport could have and did order the closure of APA Transport. (Defendant's Opposition,

Docket Entry # 146, pp. 5-6). In support of this assertion, they allege the following:

- APA World Transport had no employees and leased all of its personnel from APA Transport. (*Id.* at ¶ 5).

- APA Truck Leasing, APA International, Imperial Delivery Service and Transport Flexonomics did not utilize APA Transport to fund payroll, accounts payable or for funding to pay bills; each company had separate and independent wage rates, pay scales, salaries and seniority lists, as well as their own compensation structures. (*Id.* at ¶¶ 6, 10, 14).

- APA Truck Leasing and APA International had workers' compensation coverage under the same insurance policy that covered APA Transport, however, the policy was issued for each company and was not designed solely for APA Transport; Imperial Delivery Services and Transport Flexonomics had policies specific to each of their companies and separate from any coverage provided to APA Transport, APA Truck Leasing and APA International. (*Id.* at ¶ 11).

- APA Truck Leasing, APA International, Imperial Delivery Service, APA Transport and Transport Flexonomics each separately reported and remitted payroll withholdings; employees at each company received paychecks and W-2s solely from their respective employers; and each company had

their own separate federal tax identifications numbers and employer identification numbers. (*Id.* at ¶¶ 7-9).

- Employees of APA Truck Leasing, APA International, Imperial Delivery Service, APA Transport and Transport Flexonomics who were below the level of vice president all answered to supervisors employed by their specific employing companies. (*Id.* at ¶ 15).

- The APA Transport savings and retirement plans were multiple-employer defined benefits plans. (*Id.* at ¶¶ 16-18).

- Each company hired and fired independently of APA Transport. (*Id.* at ¶ 20).

Plaintiffs' response to Defendants assertion that APA Transport was the only employer for WARN purposes is found in Plaintiffs currently addressed motion for summary judgment (Docket Entry # 104), Plaintiffs' opposition to Defendants' motion for summary judgment (Docket Entry # 145) and Plaintiffs' reply brief in further support of summary judgment (Docket Entry # 148). Specifically, Plaintiffs assert that Defendants are liable under the WARN Act's "single employer" doctrine because the same stockholders who owned APA Transport owned Defendants except for APA World Transport, which was owned by APA Truck Leasing; because APA Transport and Defendants had the same directors, CEO and senior management; because the stockholders exercised direct control over every facet of the operations of APA Transport and Defendants, with said control including personnel decisions,

financial decisions (including intercompany loans), management, intercompany leases, loans from third parties and the pledge of assets; because APA Transport provided Defendants with payroll and accounting services, purchased their office supplies, provided data processing, maintained their personnel records, handled their theft investigations, provided them with labor relations services, negotiated collective bargaining agreements for them, employed the same auditors and arranged their financing. (Plaintiffs' Motion, pp. 29-30).

i. Who constitute "employers" for the purposes of Summary Judgment Motion Docket Entry # 104; Summary Judgment Motion Docket Entry # 116; Summary Judgment Motion Docket Entry # 119; Summary Judgment Motion Docket Entry # 121; Summary Judgment Motion Docket Entry # 123; and Summary Judgment Motion Docket Entry # 125

In light of the foregoing, the Court will first determine whether Defendants APA Trucking Leasing Corp., APA International Corp., APA World Transport Corp., Imperial Delivery Service, Inc. and Transport Flexonomics, Inc. (excluding APA Transport) should be considered "employers" as that term is defined within the WARN Act and applicable case law.

In determining affiliated corporate liability under the WARN Act, the Third Circuit Court of Appeals has granted courts "the exercise of the flexibility that this area of law requires." Pearson v. Component Technology Corp., 247 F.3d 471, 491 (3d Cir. 2001). In

Pearson, the Third Circuit considered which balancing test should be applied in determining whether affiliated companies could be held liable under the WARN Act. The Court noted and rejected several different balancing tests employed by other courts, which included, in part, the integrated enterprise test and the veil-piercing test previously derived for use for other corporate law issues. Id. at 489. Rather, the Third Circuit found that "the most prudent course is to employ the factors listed in the Department of Labor regulations themselves." Id. The Court went on to explain that "[T]his approach not only has the virtue of simplicity (if anything in this area of law can be described as 'simple'), but also allows for the creation of a uniform standard of liability for the enforcement of a federal statute . . . [F]inally, and most importantly, the DOL factors are the best method for determining WARN Act liability because they were created with WARN Act policies in mind and . . . focus particularly on circumstances relevant to labor relations." Id. at 489-90.

The DOL factors to which the court refers are listed in 20 C.F.R. § 639.3(a)(2) and are as follows: "(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations." In Pearson, the Third Circuit went further and defined some of factors in question.

Specifically, the Court defined the "unity of personnel policies" factor as an inquiry to determine whether nominally separate corporations actually functioned as a single entity with respect to policies on a day-to-day basis. Id. at 490. Further, the Court held

that the "de facto exercise of control" factor "allow[s] consideration not only of whether the two corporations shared the same labor policies, as the DOL's 'unity' factor would suggest, but also of whether the parent company directly exercised control over the particular policy at issue."

Additionally, in contemplation of the "common ownership" factor that "ownership-and even ownership coupled with common management-is not a sufficient basis for liability . . . there is nothing to prevent courts from requiring a higher showing of control in the absence of true ownership, just as they [courts] have done in traditional veil-piercing lender cases." Id. at 494 (citing International Bhd. of Teamsters Local 952 v. American Delivery Serv., 50 F.3d 770, 775 (9th Cir. 1995)); see also Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-6 (9th Cir. 2004) ("Common ownership is the least important factor, and the remaining factors are guideposts only. Single employer status ultimately depends on all the circumstances of the case and is characterized as an absence of an arms length relationship found among unintegrated companies.").

Ultimately, the Third Circuit held "that the regulation's specific instruction that the 'factors' are a nonexhaustive list is meant only as a reminder that the inquiry is a balancing test, and that, as with most balancing tests, a number of circumstances may be relevant . . . consideration of evidence that might otherwise fall outside of the listed factors [is allowed]." Id. at 490-91.

In the context of a summary judgment motion, the Court in Pearson held that "the WARN Act test for intercorporate liability presents a question of fact." Id.

at 497. The Court further observed that "of course, as is always the case, our decision to characterize it as such does not preclude an inquiry as to whether plaintiffs have put forth enough evidence to create a genuine issue of material fact so as to survive summary judgment." Id.

Here, the Court finds that no genuine question of material fact has been set forth by Plaintiffs. Plaintiffs set forth facts that Defendants do not refute, rather, Defendants point to additional evidence to support their assertion that they are not "employers" under WARN. As such, the Court will apply the uncontradicted evidence provided to the DOL factors referenced by the Third Circuit Court of Appeals in determining whether all Defendants can be considered a single employer for WARN Act liability purposes.

All parties agree that the stock holders of APA Transport were the stockholders of all remaining Defendants (except for APA World Transport which was wholly owned by APA Truck Leasing) and that the "common ownership" DOL factor has been satisfied in favor of Plaintiffs. Similarly, APA Transport and all remaining Defendants maintained the same presidents and vice-presidents, thereby satisfying the second DOL factor, which is whether APA Transport and the remaining Defendants had "common directors and/or officers."

As previously discussed however, the Court is well aware that these factors are not, in and of themselves, determinative, and are often considered to be of lesser importance than the remaining factors and the individual circumstances of a presented situation as a whole. We therefore turn to the next DOL factor,

which is the consideration of "de facto exercise of control."

The Third Circuit in Pearson alluded to the significance of this DOL factor when it stated, in part: " . . . because the balancing of the factors is not a mechanical exercise, if the de facto exercise of control was particularly striking - for instance, were it effectuated by 'disregarding the separate legal personality of its subsidiary' - then liability might be warranted even in the absence of the other factors." Pearson, 247 F.3d at 504.

The "de facto exercise of control" factor, which in essence is designed to demonstrate unofficial control, or day-to-day operational control, becomes a sort of catch-all for the bulk of the evidence set forth by the parties for purposes of these summary judgment motions. Evidence presented that falls under this category includes consideration of the unity or disparity of: lower level supervisors and/or managers; workforces; pay scales; payrolls; workers compensation; and employee health benefits. Childress, 357 F.3d 1000 at 1006.

The Court first considers the lower levels of management employed by Defendants. It is clear based upon the evidence provided that supervision below the level of vice-president was conducted on an individual company basis. Put another way, employees at a certain APA company responded to different supervisors than those employees of another APA company. This evidence demonstrates some level of autonomy in supervision among the multiple companies.

Next, there is evidence to support autonomy throughout the APA companies with regard to finances. Specifically, none of the other companies in question utilized APA Transport to fund payroll or to pay bills. Further, each company had separate and independent wage rates, pay scales, salaries and seniority lists, as well as their own compensation structures. Additionally, for tax purposes, each company separately reported payroll withholdings, and each had their own federal tax and employer identification numbers. Also, each company maintained their own workers' compensation coverage, although at times several were listed on a single policy.

Combined, this evidence suggests significant autonomy throughout the companies and a clear intent among the shareholders that each company stand or fall alone, without others within their ownership being affected. This observation is further supported by the fact that APA Transport was the only company among the Defendants to collapse.

Although there is some evidence presented by Plaintiffs that intercompany loans had occurred prior to APA Transport's closure, that alone cannot mitigate the overwhelming evidence of individuality each company displayed. Further, had there been a significant commingling of finances between APA Transport and the remaining Defendants, there would be at least some evidence of efforts by the other Defendant companies to financially assist APA Transport. As it stands, there is not. Additionally, although Plaintiffs point to some combined utilization of accounting, auditing and data processing services, that evidence is diminished by evidence presented by

Defendants that each company paid their own share of the costs for the collective utilization.

The Court therefore finds that Defendants have provided adequate evidence to satisfy the "de facto exercise of control" DOL factor and shall be applied in their favor.

The next DOL factor for consideration is the "unity of personnel policies emanating from a common source" factor. As previously acknowledged, this factor is intended to determine whether nominally separate corporations actually functioned as a single entity with respect to policies on a day-to-day basis. Pearson at 490. Types of policies applicable to this DOL factor include, but are not limited to, centralized hiring and firing, payment of wages and personnel and benefits record keeping. Vogt v. Greenmarine Holding, 318 F. Supp.2d 136, 142-143 (S.D.N.Y. 2004). Centralized control of labor (i.e., one company must possess and exhibit the ability to control labor negotiations of the other entity) is also often considered a related element within this DOL factor. Salaried Machine and Furniture Workers v. Midwest Fasteners, 779 F. Supp. 788, 797 (D.N.J. 1992).

In the case at bar, evidence provided by Defendants shows that each company possessed their own employees and their own policies regarding compensation, vacation and sick time (with the noted exception of APA World Transport, which did not have employees). Further, as previously demonstrated, payroll was funded by each individual company separately, although several Defendants relied upon Defendant APA Transport to process payroll. And although some services were centralized through APA

Transport for certain functions, including in part labor functions, each company individually paid APA Transport for the costs of those services. Additionally, personnel files, to a large extent, were maintained separately by individual companies, although there were some personnel files stored at APA Transport by APA Truck Leasing, APA International, Imperial Delivery Service and Transport Flexonomics. Also, the welfare benefit plan, the contribution retirement plan and the benefit retirement plan were multiemployer plans, with each company maintaining its own stake. Finally, the companies hired and fired independently.

Because the measure of the unity of the personnel policies of Defendants presented by Plaintiffs is so limited, and because it is overwhelmed by evidence of independence among the companies, this Court finds that the "unity of personnel policies" DOL factor will be applied in Defendants favor.

The final factor for this Court's consideration is the "dependency of operations", if any, between Defendants. Based upon the previously discussed evidence and analysis of prior DOL factors which are closely analogous to this (including the "de facto exercise of control" factor and the "unity of personnel policies" factor), the Court finds that each company operated independently, and that no "dependency of operations" existed between Defendants.

The aforementioned factors, coupled with the circumstances surrounding the demise of APA Transport, leads this Court to the conclusion that Defendants operated independently. Defendants cannot reasonably be considered a "single employer" for WARN Act purposes. To do so would make

Defendants, who had no involvement in APA Transport's operations or ultimate shut down, and who were tied to APA Transport simply because Defendants and APA Transport had the same owner and directors/officers, liable for potential WARN Act violations APA Transport may or may not have committed. Therefore, Defendants APA Trucking Leasing Corp., APA International Corp., APA World Transport Corp., Imperial Delivery Service, Inc. and Transport Flexonomics, Inc. (other than APA Transport) can not be held liable under the "single employer" WARN Act doctrine.

ii. 60 day notice - Summary Judgment Motions Docket Entry ##'s 104 and 111

The next issue for this Court's consideration is the 60 day notice provision of the WARN Act. None of the parties debate that the 60 day notice provision was not met. What issues are contested are whether Defendant APA Transport satisfies the "faltering business" exception to the WARN Act and, to a lesser extent, whether the notification sent by APA Transport provided an adequate explanation as to why 60 days notice was not given, as required under the WARN Act. As with this Court's analysis regarding "employer" status, there are no genuine issues of material facts and these issues shall be ruled upon as a matter of law.

Pursuant to the WARN Act, specifically, 29 U.S.C. § 2102(a)(1), "employers" of a "plant closing" or "mass layoff" which resulted in "affected persons" of said closure or layoff are entitled to 60 days advance written notice to "each representative of affected employees as of the time of the notice or, if there is no

such representative at that time, to each affected employee . . ." Id.. However, the WARN Act permits less than 60 days' notice if the employer is "actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business."[2]

Pursuant to 20 C.F.R. § 639.9(a)(1), to be "actively seeking capital" a company must be "seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit or business through any other commercially reasonable method. The employer must be able to identify the specific actions taken to obtain capital or business." Further, the employer must articulate that the additional capital, if obtained, would avoid shutdown and would keep the job site open for a reasonable period of time. See 20 C.F.R. § 639.9(a)(3). The employer must have been actively seeking capital or business "at the time that 60-day notice would have been required." Also, the employer must show that there was a realistic opportunity to obtain the financing. See 20 C.F.R. § 639.9(a)(2). As it is the employer's responsibility to

---

[2] Although Plaintiffs, in anticipation of defenses Defendant APA Transport would most likely set forth in response to Plaintiffs summary judgment motion, discussed the "unforeseeable business circumstances" defense as well as the "faltering business" defense, Defendant APA Transport does not, in its opposition, argue such a position. As such, the Court will discuss the "faltering business" defense only.

make the aforementioned showings, it is the employer's burden of proving the elements. United Mine Workers of America Intern. Union v. Lehigh Coal and Navigation Company, 2005 WL 2990880 at *3 (M.D.Pa. 2005). Further, the "faltering company" exception should be "narrowly construed" in keeping with the promulgated regulations. See 20 C.F.R. § 639.9(a).

In consideration of the foregoing, the Court first considers whether Defendant APA Transport "actively" sought financing and whether the financing sought could realistically be obtained. At the outset, the Court rejects Plaintiffs' notion that affirmative action needed to occur by Defendant APA Transport on December 20, 2001, which was the date notice would have had to been disseminated to accumulate the 60 days necessary to allow for a February 20, 2002 shut down. This Court can locate no precedent that sets forth such a precise requirement, and would approach any said precedent with great trepidation. Simply put, to require such precision from an employer would effectively eliminate any practical application of the "faltering business" exception as it would require said employer to read the minds of the financial institution or institutions from which it seeks financing.

The impracticality of Plaintiffs' position is illustrated by the facts of the present case. Here, APA Transport, realizing that it was in financial straights that significantly worsened after the tragic events of September 11, 2001, approached the only financial institution it could (as it was bound to do pursuant to the then-existing Loan and Security Agreement), which was Transamerica. APA Transport did not exhibit any sort of undue delay in seeking additional

financing after realizing that the events of September 11, 2001 were having a negative impact on its finances, as it met with Transamerica on October 24, 2001 to request additional funds. Although APA Transport may have been operating "in the red" for one or more years prior to September 11, 2001, APA Transport was nevertheless obviously able to make payroll and maintain operations during that time. There are conflicting statements by the parties regarding comments which may or may not have been made by Transamerica during the October 24, 2001, meeting regarding APA Transport's prospects of obtaining additional funding. However, the transcript of the deposition of Christopher Norrito, the Transamerica representative assigned to APA Transport, settled that dispute in favor of Defendants during a deposition previously given. Specifically, on pages 154-156 of Exhibit A to the Keith McMurdy Certification (Docket Entry # 147), Mr. Norrito was asked about Transamerica's state of mind regarding APA Transport's request for additional funding. Mr. Norrito's response, in relevant part, is as follows:

> Q. Anytime after September 2001 that you received any communication from anybody at APA Transport in which they indicated that they're seeking additional monies from Transamerica?
>
> A. Yeah . . . . . .
>
> . . .
>
> A. I think we were all in agreement that Transamerica that if the company - - or if the individuals or the affiliates continued to support the company and they stayed within

the availability under the revolver and continued to make their term loan payments and their interest payments, then we would go as long as they wanted to keep the company afloat or could keep the company afloat.

Q. So you would extend the duration of the loan? Is that what you're saying?

A. If they were going to continue to put in money to keep it solvent.

Q. And that was a requirement that the - - that Mr. Imperatore would put in money to keep it solvent?

A. **No, in the latter part of 2001, no, it wasn't a requirement.** (emphasis added). It was a discussion internally at Transamerica that, you know, okay, you know, the facility is going to be maturing. We probably had defaults. You know, what's our course of action. Well, we're getting our monthly principal and interest payments. They're still within the requirements of the borrowing base and we're collateral good. So as long as Armand and/or Arthur and/or the affiliates wanted to or could continue to put in money, we weren't going to pull the plug. Why should we do anything.

Q. You weren't going to call the loan on February - - on the credit facility on February 28th?

A. I don't think that was the intention.

The highlighted portion, set in context of the surrounding questions and answers clearly demonstrates that Transamerica did not set forth any requirement for the owners of APA Transport to input more capital on APA Transport's behalf.

Further evidence to support APA Transport's assertion that they were actively seeking funding and that obtaining the funding was a realistic hope can also be found in Mr. Norrito's deposition:

Q. Was it the intention of Transamerica to pour more money into APA Transport?

A. At the end of 2001?

Q. Yes.

A. **All of our options were open, yes.** (emphasis added).

Q. Did you indicate to anybody at APA what was required for them to have gotten additional funding?

A. No, what probably happened was probably Fred brought it up, mentioned it. And then I remember after September 11th it was constantly evolving projection because I thing - - I know from my perspective and certainly from - - certainly from my perspective and I think from their perspective the drop in sales and the

> increase in the losses was just more dramatic than anyone anticipated.

Thereafter, Defendant APA Transport waited for Transamerica's response. Any dispute as to whether APA Transport conducted continual communications with Transamerica regarding the load inquiry or not is immaterial. APA Transport sought funding, and on February 13, 2002 was denied funding. Therefore, there was no basis before that time to anticipate a closure date of February 20, 2002, and thereby not reasonable to insist that APA Transport take specific, actual and literal steps on December 20, 2001, when they had taken said steps on October 24, 2001. And as evidenced, Defendant APA Transport took active steps to obtain funding to continue to operate as it sought "financing or refinancing through the arrangement of loans" and those steps resulted in a "realistic" and reasonable possibility of obtaining said funding. Since APA Transport hoped to obtain funding from Transamerica, to provide notice of termination to employees prior to receiving word regarding the loan would not only have been premature, but also, would have diminished APA Transport's chances of obtaining a loan at that time.

Therefore, this Court concludes that Defendant APA Transport has satisfied the requirements of 20 C.F.R. § 639.9(a) and has successfully set forth a "faltering business" defense which exonerates Defendant APA Transport from liability for its failure to provide 60 days notice to its employees.

iii. reduced notice provision - Summary Judgment Motion Docket Entry # 104

Plaintiffs final argument in their pending summary judgment motion is that even if Defendants satisfied the "faltering business" exception, the reduced notice provision of the WARN Act is unavailable to Defendants because they failed to give a brief statement of the basis for reducing the notification period that was "specific", as is required under 29 U.S.C. § 2102(b)(3).

Section 2102(b)(3) of Title 29 provides, in relevant part:

> [if closure before conclusion of the 60 day period] an employer . . . shall give as much notice as its practicable and at that time shall give a brief statement of the basis for reducing the notification period.

Further clarification of the "brief statement of the basis" requirement is found in 20 C.F.R. § 639.9, which states:

> If one of the exceptions [such as the "faltering business" exception] is applicable, the employer must give as much notice as is practicable . . . and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

20 C.F.R. § 639.7 states, in relevant part:

> (a) All notice must be specific . . .
>
> (a)(4) [T]he information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN . . .
>
> (c) Notice to each representative of affected employees is to contain: (1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information; (2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (3) The expected date of the first separation and the anticipated schedule for making separations; (4) The job titles of positions to be affected and the names of the workers currently holding affected jobs . . .
>
> (d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain: (1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (2) The expected date when the plant closing or mass

> layoff will commence and the expected date when the individual employee will be separated; (3) An indication whether or not bumping rights exist; (4) The name and telephone number of a company official to contact for further information.

Here, APA Transport received notice by Transamerica on February 13, 2002 that it would not receive any additional financing. On February 14, 2002, Mr. Armand Pohan, APA Transport's President, advised all employees, both union and non-union, of the situation in a letter that stated:

> In response to mounting losses, the ownership of APA poured millions of dollars back into the operation, and has sought additional financing in order to persevere through this recession. Unfortunately, our lending institution has now advised us that it would not provide us with the critical additional financing we have requested to weather the storm. This was our last and best hope and we cannot continue to operate without this financing.

Immediately thereafter, by letter addressed to all union representatives, dated February 14, 2002, Mr. Burton Trebour, Vice President of Labor and Administration, stated as follows:

> The reason for the shortened notice is as follows: APA had been actively seeking financial assistance to alleviate its severe economic problems. If APA had provided earlier shutdown notice, it would have precluded our ability to obtain the financing necessary to continue in

> business. APA has now been notified that its request for this critical financing has been rejected and, accordingly, it can no longer afford to operate.

The Court finds that the notifications provided by APA Transport to its employees was sufficient for WARN Act purposes. Although several suggested pieces of information as set forth in the regulations are missing, the Court notes that flexibility in the notice requirement is recognized by the regulations as well. See 20 C.F.R. § 639.7(a)(4). "Fairly read, the regulations require a practical and realistic appraisal of the information given to affected employees." Kalwaytis v. Preferred Meal Systems, Inc., 78 F.3d 117, 121-22 (3d Cir. 1996) (citing ambiguity of employees' future prospects with company as potentially failing the notice requirement). The notices at bar provide the following information, in clear and concise language: (1) that APA Transport was closing; (2) why APA Transport was closing; (3) previous attempts made to prevent the closing which ultimately failed; (4) why earlier notice was not feasible; and that the closure was permanent. This information satisfies the most important prongs of the regulation, and fairly read with a practical eye, the information was sufficient to satisfy the "brief statement" WARN Act requirement.

Plaintiffs assert that vital information was missing, including: lack of specificity as to why earlier notice was not given; what "severe economic problems" constituted; who financing was sought from; why APA Transport's request for financing was rejected; how acceptance of the financing request would have allowed APA Transport to continue to operate; and

when was APA Transport notified that its request for financing was rejected. However, none of these items are in the spirit of the notice requirement. The notice requirement is designed to ensure that the employees are aware of the situation and its permanency, or lack thereof. This is to provide much needed disclosure so that the employees and community can be aware of what circumstances they are operating. The information Plaintiffs suggest is relevant is more in keeping with why the closure was happening, which would not have assisted APA Transport's employees in the least, and which is not a basis for said employees' consideration. For example, how are employees of APA Transport assisted in any way by knowing which bank rejected APA Transport's loan request, or what APA Transport thought severe economic problems constituted, or how financing would have allowed APA Transport to continue to operate? What purpose would that information serve at that time for those employees? Some if not all of the proposed information Plaintiffs suggest is missing is information which, at the time of notification, would have been either irrelevant or merely hypothetical. Some are simply obvious. None are relevant for notification purposes. As such, Plaintiffs' argument regarding Defendant APA Transport's notification is without merit and will be denied.

D. Motion to Dismiss 12(b)(6) Motion (Docket Entry # 106)

Defendants APA Transport, APA International Corp., APA Truck Leasing Corp., APA World Transport Corp., Imperial Delivery Service, Inc. and Transport Flexonomics have separately filed as a motion to dismiss pursuant to F.R.Civ.P. 12(b)(6).

Defendants argue, as they have in their previous summary judgment motions, that they cannot be considered "employers" as that term is defined under the WARN Act. Defendants fail to systematically list the ways in which they operate independently from APA Transport in their moving papers however. Further, the Court notes that Plaintiffs have failed to respond. However, the 12(b)(6) standard favors plaintiffs and does so in this circumstance as well.

Specifically, a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the Complaint as true, and viewing them in the light most favorable to Plaintiff, Plaintiff is not entitled to relief. *Oran v. Stafford*, 226 F.3d 275, 279 (3d Cir. 2000); *Langford v. City of Atl. City*, 235 F.3d 845, 850 (3d Cir. 2000); *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). The Court may not dismiss the Complaint unless Plaintiff can prove no set of facts that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985), *cert. denied*, 474 U.S. 935 (1985). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1510 (2005) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Under Rule 12(b)(6), the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." *Turbe v. Gov't of the V.I.*, 938 F.2d 427, 428 (3d Cir.

1991) (citing *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1394-95 (3d Cir. 1991)); *see also Langford*, 235 F.3d at 850; *Dykes v. SE. Pa. Transp. Auth.*, 68 F.3d 1564, 1565, n.1 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996); *Piecknick v. Commw. of Pa.*, 36 F.3d 1250, 1255 (3d Cir. 1994); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt "that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the claim." *Ransom* v. *Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss.").

Here, when taking the accusations of Plaintiffs' Amended Complaints as true and viewing them in the light most favorable to said Plaintiffs, this Court cannot conclusively find that Plaintiffs would not be entitled to relief. Of course, and as evidenced previously, a detailed accounting by Defendants chronicling the activities of the defendant companies which demonstrate Defendants' independence from APA Transport under a Rule 56 standard might produce a very different result.

Nevertheless, as it stands, this Court will deny Defendants' motion to dismiss under Rule 12(b)(6).

III. CONCLUSION

For the foregoing reasons: Defendants' motion for summary judgment seeking to have all claims of employees from terminals that employed fewer than 50 full-time employees dismissed [Docket Entry # 101] is granted; Defendants' motion for summary judgment seeking the dismissal of Counts Two and Three of the Third Amended Complaint [Docket Entry # 103] is granted; Plaintiffs' motion for summary judgment [Docket Entry # 104] is denied; Defendants' motion to dismiss [Docket Entry # 106] pursuant to Rule 12(b)(6) is denied; Defendants' motions for summary judgment regarding employer status (except for APA Transport) [Docket Entry ##'s 116, 119, 121, 123 and 125] is granted; and Defendant APA Transport's motion for summary judgment [Docket Entry # 111] regarding the faltering business exception is granted.

Dated: December 7, 2006

s/Garrett E. Brown, Jr.
HONORABLE GARRETT E. BROWN, JR.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-1050, 07-1051, 07-1052

[Filed October 6, 2008]

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS LOCAL UNION NO. 560,
Appellant No. 07-1050

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

BRIAN CAMPBELL; JOHN CRONIN JR.;
ANDREW IMPERATORE; OMER MASSE;
GARY PEGORARO; DEBORAH TETRO;
and RICHARD YURCISIN,
Appellants No. 07-1051

IN RE: APA TRANSPORT CORP.
CONSOLIDATED LITIGATION

TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY; TEAMSTERS
HEALTH AND WELFARE FUND OF
PHILADELPHIA AND VICINITY; and

TEAMSTERS LOCAL NO. 470,)
Appellants No. 07-1052)
)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN AND* ALDISERT, Circuit Judges

The Petition for Rehearing filed by the Appellees in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: October 6, 2008
cc: Keith R. McMurdy, Esq.
David Grossman, Esq.
Paul A. Friedman, Esq.
John C. Lankenau, Esq.

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* Judge Aldisert's vote is limited to panel rehearing only.

APPENDIX F

UNITED STATES CODE
TITLE 29 - LABOR
CHAPTER 23 - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

29 U.S.C. § 2102. Notice required before plant closings and mass layoffs.

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order -

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State or entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A) of this title, and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2) (A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless -

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

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(2)

No. 08-812

FILED
FEB 27 2009
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

A-P-A TRANSPORTATION CORPORATION,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO, 560, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Third Circuit's Opinion did a rigorous analysis of Petitioner's evidence and determined that the "faltering company" exception under the Worker Adjustment Retraining Notification Act, 29 U.S.C. §2102(b)(1) was not available to the Petitioner, where said Opinion does not conflict with any decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. The Third Circuit properly reversed the Decision of the District Court because there was no dispute as to any material fact, and judgment should have been entered in favor of the Respondents.

RULE 14.1(b) STATEMENT

Respondents are: Teamsters Local Union No. 560, Teamsters Pension Trust Fund of Philadelphia and Vicinity, Teamsters Health & Welfare Fund of Philadelphia and Vicinity, and Teamsters Local 470, and Brian Campbell, *et al.*, a certified class of nonunion employees.

RULE 29.6 CORPORATE DISCLOSURE

None of the Respondents are corporations.

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INTRODUCTION

Petitioner, APA Transport Corp. ("APA" or "Petitioner") has presented no "compelling reasons" for its Petition for a Writ of Certiorari to be granted ("Petition"). *See*, Sup. Ct. R. 10. Petitioner admits that the Third Circuit's August 29, 2008 Opinion ("Opinion") is not in conflict with any decision of this Court or another Court of Appeals (Petition ["Pet."] at 5) or that the Third Circuit's Opinion cited an important federal question that has not been settled by this Court. *See*, Sup. Ct. R. 10(a)-(c). At best, Petitioner limits its argument to a half-hearted attempt to argue that the Third Circuit's Opinion may lead to a conflict in the Circuits at some point in the future. (Pet. at 5). Petitioner has offered no basis to justify granting certiorari, therefore, the Petition for Certiorari should be denied.

APA was a trucking company. On February 20, 2002, APA closed its terminals.

The Worker Adjustment Retraining Notification Act ("WARN Act") provides that covered employers - generally, those that employ at least 100 full-time workers at a single site of employment - must provide sixty (60) days' written notice before a closing or mass layoff. *See*, 29 U.S.C. §2101, *et. seq.* Employers that violate the WARN Act are liable to their employees for back wages and benefits for each day that the notice is not provided, up to a maximum of sixty (60) days. 29 U.S.C. §2104. APA failed to give the proper WARN Act notice before its closure. Respondents filed a Complaint against APA in the United States District Court for the District of New Jersey for Petitioner's

failure to provide the proper WARN Act notice. APA's defense was that it did not have to give the notice because of the "faltering company" exception to the WARN Act. 29 U.S.C. §2102(b)(1).

The matter proceeded through discovery. At the conclusion of discovery, cross-motions for summary judgment were filed.

The District Court gave a short slanted view of the facts and a cursory review of the requirements of the statute concerning the "faltering company" exception and the regulation regarding same. The District Court granted summary judgment in favor of APA. (Petition Appendix ["Pet. App."] 77a-82a).

In contrast, the Third Circuit performed a rigorous analysis of the facts and the requirements that the Petitioner was required to meet in order to be relieved of the WARN requirements under the "faltering company" exception and the related regulations. That court concluded that the undisputed material facts established that the Petitioner had not met its burden under the exception. (Pet. App. 27a-37a).

The Petitioner has filed this Petition because it disagrees with the Third Circuit's findings of fact and conclusion on the merits. That is not sufficient to grant the Petition.

STATEMENT OF THE CASE

APA was a regional trucking company. APA had collective bargaining agreements with local unions, including the Teamsters Local Union No. 560 and Teamsters Local Union No. 470, which were at two (2) different locations. Brian Campbell is a member of the certified class of non-union employees who were affected by APA's closure of its terminals.

On December 19, 1996, APA entered into a Loan and Security Agreement ("Loan Agreement") with TransAmerica Business Capital Corporation ("TransAmerica"). The Loan Agreement had a termination of February 28, 2002. The Loan Agreement provided APA with a revolving credit facility that allowed it to borrow up to $40 Million, secured by property, equipment and accounts receivable. (Pet. App. 5a). The Loan Agreement required APA to provide TransAmerica with regular reports as to its outstanding accounts receivable and to comply with certain financial covenants. (Pet. App. 6a).

Following the execution of the Loan Agreement, APA suffered continual losses in business. (Pet. App. 6a). As a result, APA defaulted on the loan covenants on multiple occasions in 1999, 2000 and 2001. *Id.* After each such default, TransAmerica and APA re-negotiated the Loan Agreement, so that APA's breaches were waived and/or the applicable covenants were amended. *Id.*

APA was negatively affected by the economic conditions following the September 11, 2001 terrorist attacks on the World Trade Center. Those conditions

contributed to an additional thirty (30%) percent decline in APA's revenues. *Id.* The resulting reduction in the value of APA's accounts receivable limited the amount of money which it could continue to borrow from TransAmerica under the Loan Agreement. *Id.*

On October 24, 2001, TransAmerica convened a meeting with APA's officers to discuss how APA was going to operate going forward, "given its losses". *Id.* At that meeting, TransAmerica's President, Steven Fisher, informed APA that TransAmerica would not continue to fund operating losses and would require additional contributions from APA's owners before granting additional loans and extensions. *Id.* APA made no formal request at the October 24, 2001 meeting to secure additional financing or to extend the Loan Agreement. *Id.* at 7a.

In November of 2001, TransAmerica notified APA that it was once again in default of a covenant of the Loan Agreement. On December 10, 2001, TransAmerica agreed to a Fifth Waiver and Amendment to the Loan Agreement to cure the those defaults. *Id.* at 7a. The waiver gave APA additional time to cure its default but was not related to any attempt by APA to obtain additional financing from TransAmerica.

During the period between October 24, 2001 and December 20 or 28, 2001, there were no additional meetings, no telephone conferences, and no correspondence between APA and TransAmerica with respect to possible additional financing. APA made no written proposal or request to TransAmerica to obtain additional financing.

Pursuant to its terms, the Loan Agreement was scheduled to expire on February 28, 2002, at which time the entire loan would be due. *Id.* at 7a. Under the Loan Agreement, APA was required to make any request for extensions or renewal of the Loan Agreement in writing sixty (60) days before the termination date of the Loan Agreement. *Id.* at 7a. Prior to the end of 2001, however, APA had not made any written or oral request to TransAmerica to extend or renew the Loan Agreement. *Id.* at 7a.

On January 2, 2002, APA sent a letter to TransAmerica requesting additional financing for APA, which it proposed would be secured by mortgages on two (2) freight terminals owned by companies related to APA. *Id.* at 7a-8a. That letter did not request an extension or renewal of the Loan Agreement.

On January 15, 2002, a second meeting was held between TransAmerica and APA to discuss the state of APA's finances. *Id.* at 8a. TransAmerica made no commitment with respect to additional financing; nor did it indicate that it would extend the loan beyond its termination date or increase its lending to APA. *Id.* at 8a.

On January 24, 2002, APA again requested an additional loan. *Id.* at 8a. TransAmerica did not respond to that letter. *Id.* at 9a.

On February 13, 2002, TransAmerica sent APA a letter formally notifying it that the Loan Agreement would terminate pursuant to its terms on February 28, 2002 and that TransAmerica would not agree to extend

the Loan Agreement to provide additional financing. *Id.* at 8a. On or about February 14, 2002, APA notified its employees that it would close its terminals effective February 20, 2002. As a result of the shutdown, all of APA's employees were terminated. APA paid no wages or benefits to any employees after February 22, 2002.

Approximately six (6) weeks after the shutdown, an APA-related company lent APA between $10-15 Million Dollars. The loan was secured by an open-ended mortgage and security agreement dated June 5, 2002 on APA's North Bergen, New Jersey terminal facility. *Id.* at 10a.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by the Court. Accordingly, the Petitioner has not carried met its burden of demonstrating any "compelling reasons" for the Petition to be granted. *See*, Sup. Ct. R. 10.

On review by the Third Circuit, legal issues that were decided at summary judgment are reviewed de novo. *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 199 (3d Cir. 2001).

Contrary to the Petitioner's assertion, the Third Circuit's decision is based on the undisputed material facts, a thorough analysis of the legal requirements of the faltering business exception of the WARN Act and its interpretive regulations. The faltering business

exception to the WARN Act is to be construed narrowly and access to that defense is strictly limited. Contrary to Petitioner's assertion, the Third Circuit's decision does not make the faltering business exception a nullity. The faltering business exception is an affirmative defense to liability, which means that the employer bears the burden of establishing the elements for the faltering business exception. 20 C.F.R. §639.9. The Third Circuit correctly determined that APA failed to meet its burden of proof.

I. The Third Circuit Correctly Determined That The Petitioner Did Not Meet Its Burden Of Proof Concerning The Elements Of The Faltering Company Exception To The Warn Act And Related Regulation.

As a threshold matter, a company seeking to qualify as a "faltering company" must demonstrate that it had inadequate capital to continue functioning and, as such, was in a faltering state. 20 C.F.R. §639.9. (Pet. App. at 28a). Petitioner admits that fact.

The statutory provision states that:

> (a) an employer may order the shutdown of a single site of employment before the conclusion of the sixty (60) day period if as of the time that the notice would have been required the employer was *actively seeking capital or business* which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believes that

> giving a notice required (by the WARN Act) would have precluded the employer from obtaining a needed capital or business.

29 U.S.C. §2102(b)(1) (emphasis added).

The Department of Labor regulations which interpret the "faltering company" exception of WARN break the provision into four (4) required component parts, so that to benefit from the defense an employer must prove: (1) it was actively seeking capital at the time the sixty (60) day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer reasonably and in good faith believed that the sending of the sixty (60) day notice would have precluded it from obtaining the financing. 20 C.F.R. §639.9(a). (Pet. App. at 28a-29a).

The Respondents conceded Points (3) and (4) above but asserted that APA had failed to meet its burden of proof on points (1) and (2) above. The legislative history of the WARN Act makes clear that the faltering company defense applies only when the employer can demonstrate that all of the above-referenced factors existed sixty (60) days before the closing, at the time when the WARN Act notice was required to be given or shortly before.

According to the Congressional Conference Report issued when Congress passed the WARN Act, the key elements of the defense, which is intended to be a "narrow one" are that: (i) the employer was "actively seeking capital or business"; (ii), if the employer obtained this capital or business, it "would have enabled the employer" to prevent or forestall the shutdown; and (iii), that the employer "reasonably and in good faith believed" that giving the notice required would have precluded the employer from obtaining the necessary capital or business that it had a reasonable opportunity to obtain. Thus, to avail itself of this defense, *an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required,* to obtain a loan, to issue bonds or stocks, or secure new business. This duty to seek capital or business falls on the employer . . . 134 Cong. Rec. S. 8686-01 (1988), *See also, Carpenters District Council v. Dillard Department Stores*, 15 F.3 1275, 1281 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

The legislative history and the regulation makes clear that the critical time when the employer must be taking specific steps to obtain financing capital to secure new business is "*at*" or "*shortly before*" the sixty (60) days prior to the shutdown. *Law v. American Capital Strategies*, Civil No. 3:05-0836, 2007 WL 221671*11 (M.D. Tenn. Jan. 26, 2007); *also see, Local 397, International Union of Electronic, Electrical and Salaried Machine and Furniture Workers, AFL-CIO v. Midwest Fasteners Inc.*, 779 F. Supp. 78, 82 (D. N.J. 1992).

To be "actively seeking capital or business", a company must be "seeking financing or refinancing through the arrangement of loans, the issuance stock, bond or other methods of internally generated financing or the employer must have been seeking additional money, credit or business through any commercially reasonable method". 29 U.S.C. §2102(b)(1), 20 C.F.R. §639.9(a)(1), *American Capital Strategies*, 2007 WL 221671*10; *United Paperworkers International v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 440-441 (D. Mass. 1995). Although, APA bore the burden of proof, it failed to show that it had taken specific steps at or shortly before the time the WARN Act notice would have been required, to obtain a loan, to issue bonds or stocks, to secure new business, or other internally-generated financing, or to seek additional money, credit or business through any commercially reasonable method. *American Capital Strategies*, 2007 WL 221671*10, *also see*, *In re Old Electralloy Corp.*, 62 BR 121 (W.D. Pa. 1993); *United Paperworkers*, 901 F. Supp. at 440-441.

In this case, with a closure of the terminals on February 20, 2002, APA was required to have given the sixty (60) day's WARN Act notice by December 20, 2001. Petitioner reads the Third Circuit Opinion to indicate that APA had to take specific steps on December 20, 2001. (Pet. App. at 10). That reading is absurd. The Third Circuit indicated that APA had to demonstrate certain steps it took to seek financing by December 20, 2001. The undisputed material facts relied upon by the Third Circuit showed that Petitioner did not take any steps prior to December 20, 2001 to seek additional financing. This determination is consistent with the text of 20 C.F.R. §639.9(a)(1).

The Petitioner argues that the meeting of October 24, 2001 between TransAmerica and APA was a sign that APA was actively seeking financing. (Pet. at 12). To the contrary, at the October 24, 2001 meeting, TransAmerica clearly indicated that it would not continue to fund APA's operating losses and that the owners would have to put additional capital into the company before TransAmerica would extend any additional financing. (Pet. App. at 6a). Contrary to the Petitioner's assertion, the Third Circuit did take into account a statement by a TransAmerica subordinate that options were open. (Pet. App. at 7a). It was also noted that APA did not request additional financing or an extension of the Loan Agreement at the meeting. (Pet. App. at 7a). The Third Circuit also noted that TransAmerica's statements at the October 24, 2001 meeting made APA fully aware that TransAmerica would not provide additional financing, and that as a result the October 24, 2001 meeting did not comply with actively seeking financing requirement within the meaning of 29 U.S.C. §2102(b)(1) and 20 C.F.R. §639.9(a)(1). Moreover, it is undisputed that pursuant to APA's arrangement with TransAmerica, TransAmerica was the only possible source of financing for APA. (Pet. App. at 7a n.3).

There was no evidence of any correspondence or telephone calls to TransAmerica to seek additional financing between the October 24, 2001 meeting and December 20, 2001.

It must be noted that APA's affiliates (who shared common owners with APA) had assets to lend APA as evidenced by their $10-15 Million loan only weeks after the shutdown of APA (Pet. App. 10a). The owners of APA simply chose not to have the affiliates loan any

monies to APA before the WARN Act date for notification. Petitioner asserts that it could not predict what would happen sixty (60) days prior to the closing date. (Pet. at 6) (Pet. App. at 31a). The owners' decision not to have the affiliates loan monies to APA prior to the sixty (60) day notification date prevented APA from getting additional financing from TransAmerica. The owners' decision not to have the affiliates loan APA monies doomed the company to closure and was clearly something APA could have predicted.

The fact that APA got a waiver of default from TransAmerica on or about December 10, 2001 merely stopped the default on the loan. That waiver did not provide any additional capital to APA, nor did it provide any assurances that additional capital would be available. While the waiver indicates that TransAmerica gave APA additional time to pay its debts, it does not indicate that APA was actively seeking financing prior to the sixty (60) day notification date, as required by 20 C.F.R. §639.9(a)(1). TransAmerica was clearly aware that APA's affiliates were able to provide the necessary capital to extend the loan. In fact, TransAmerica suggested such a transfer to APA during the October 24, 2001 meeting. APA's owners simply decided not to provide those funds until shortly after the shutdown and the subsequent expiration of the Loan Agreement.

The fact that TransAmerica failed to give sixty (60) days' written notice prior to the Loan Agreement termination date confirmed that monies due under the Loan Agreement would be due in total on that date, and doomed the company to closure because APA would be left with no financing after that date.

APA's first attempt to get additional financing was on January 2, 2002 and as the Third Circuit found, that was too little and too late.

As argued previously, Petitioner makes no argument of any legal issues but instead tries to find fault with the Third Circuit's findings and interpretation of 29 U.S.C. §2102(b)(1) and 20 C.F.R. §639.9(a)(1). This Court must conclude that the Third Circuit's Opinion is consistent with the statutory and regulatory language and the Petition for Certiorari should not be granted.

II. The Third Circuit Properly Reversed The Decision Of The District Court Since There Was No Dispute As To Any Material Facts And Judgment Should Have Been Entered In Favor Of The Respondents.

The Petitioner asserts that the Third Circuit applied the wrong legal standard in reversing the Decision of the District Court (Pet. at 19). This assertion overlooks the legal standard applied by the Third Circuit, that legal issues decided at summary judgment are reviewed *de novo. TKR Cable Comp., supra.*

In this case, the factors concerning actively seeking financing have been conceded by the Petitioner in that the only steps it took were: (1) the meeting of October 24, 2001; (2) the waiver of the default on December 10, 2001; and (3) the request for additional financing with the tender of two properties on January 2, 2002. (Pet. at 12).

Essentially, the Petitioner argues that it believed that TransAmerica would extend additional financing and would extend the Loan Agreement simply because of its long-term relationship. (Pet. at 13, 20). That argument ignores the fact that in late 2000 and continuing into May of 2001, APA had negotiated a Fourth Amendment to the Loan Agreement with TransAmerica so that TransAmerica would provide additional financing. This Fourth Amendment required extensive documentation and extensive negotiations, which finally led TransAmerica to provide APA with an additional $4.7 Million solely to pay down the credit limit with TransAmerica to comply with the covenants of the Loan Agreement. Moreover, in order to obtain the loan, APA's owners and affiliate had to pledge $8.3 Million to get financing of $4.7 Million.

It is clear from the record that for the period of October 24, 2001 through the date the WARN notice was required on December 20, 2001, APA took no steps remotely similar to those it took in the negotiations to get additional financing in the Spring of 2001.

Again, it was also undisputed that TransAmerica was APA's only source of financing and there was no evidence put into the record to show any steps that APA took to get additional financing from TransAmerica in the period prior to December 20, 2001. The Third Circuit correctly determined that judgment should be entered in favor of the Respondents.

The Petitioner argues that the Third Circuit erred in not remanding the matter for trial or hearing so to better develop the record or consider additional testimony and other evidence "not previously reviewed." (Pet. at 20-22). This argument overlooks the fact APA was a movant on summary judgment and was obligated to present all evidence and highlight material and relevant facts in its argument. The Petitioner is not entitled to a second opportunity to present evidence and argument not raised in the district court.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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